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30 U.S. pp. 396
X 405

Jan. 20. 1876

SUPREME COURT OF THE UNITED STATES.

No. 11.—ORIGINAL.

EX PARTE IN THE MATTER OF JOHN HENDERSON, PETITIONER.

PETITION FOR HABEAS CORPUS.

FILED NOVEMBER 17, 1876.

To the honorable the Supreme Court of the United States of America:

The petition of John Henderson, a citizen of Louisiana, with respect, humbly represents: That your pet'r was recently indicted in the circuit court of the United States for the district and circuit of Louisiana, at New Orleans, under section 5440, Revised Statutes of the United States, for a conspiracy to commit an offence, or to defraud the United States, for which the punishment is defined as follows:

"All the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not over two years."

That under said indictment, petitioner plead not guilty, & was tried by a jury, who rendered a verdict of guilty on said charge, and that by virtue thereof the Hon'ble W. B. Woods, sole presiding judge of the said circuit court, on the second day of June, 1876, rendered judgment & signed the sentence, as per Exhibit A, made part hereof, & as will more fully appear by the exhibits marked, annexed, & made part hereof.

Now your pet'r alleges that, in execution of said sentence, the United States Government, or the marshal thereof at New Orleans, first caused him to be imprisoned in the parish jail of New Orleans, La., & afterwards caused pet'r to be delivered over to the superintendent of the State penitentiary at Moundsville, in the State of West Virginia, & your pet'r is now incarcerated therein & illegally deprived of his liberty, & daily subjected to its discipline, rules, & regulations without warrant of law or competent authority, & for the term of 16 months from the 2d June, 1876, & to pay a fine of six thousand dollars; all in direct conflict with the following statute of the United States, to wit: Sect. 5541 of the Revised Statutes of the United States says, "In every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose." Now your pet'r further shows that, by Exhibit B, also annexed & made part hereof, the legislature of the State of Louisiana passed a statute in 1814, & re-inacted it in 1870 by its revised code, which was & now is in full force, in the following words, to wit: "All the sheriffs, jailors, prison-keepers, and their deputies within this State to whom any person shall be sent or committed by the marshal of the district of Louisiana, or his deputies, under the authority of the United States, whether in civil or criminal process, or upon any process or warrant which may be issued by the President of the United States, or to those to whom he may delegate authority for any cause whatever under the law of the United States, shall be, and they are hereby, enjoined & required to receive such prisoners into custody & keep the same safely until they shall be discharged by due course of law; & all such sheriffs, jailors, prison-keepers, and their deputies, offending in the premises shall be liable to the same pains & penalties, & the parties aggrieved shall be entitled to the same remedies against them, or any of them, as if such prisoners had been committed to their custody by virtue of legal process issued under the authority of the State."

Pet'r further alleges that, by virtue of said statute, he was actually handed over to & was imprisoned in the parish of New

Orleans, and remained in its custody under said sentence for several weeks before his illegal removal to the said penitentiary at Moundsville, West Virginia; all which more fully appears by Exhibit C, hereto annexed & made part hereof, & that his removal therefrom, & his incarceration in said penitentiary, & his subjection to its rules, regulations, & discipline, are contrary to law, & are oppressive, illegal, & unwarranted.

Your pet'r denies that there is any law to authorize the Attorney-General of the United States, or the circuit court aforesaid, to
7 order or designate in such a case as this that y'r pet'r be imprisoned in the penitentiary at Moundsville, West Virginia, or in any penitentiary at any other place, for his imprisonment, employment, & confinement, under said indictment, finding of the jury, the statutes in such case made & provided, or of a lawful sentence thereunder, but, on the contrary, pet'r alleges that the authority of the Att'y-General or the said court to designate a jail or penitentiary is limited & special, & that it is a power qualified & coupled with conditions-precedent which did not exist in this case, and annulled the power, and which said Att'y-Gen'l or said court could only lawfully exercise in case the
8 State of Louisiana had not by her legislature provided for receiving, or refused the use of its jails & penitentiary to prisoners of the United States, & that said Attorney-General Pierrepont has therefore misconstrued or inadvertently usurped authority & exceeded his powers and duties, as defined by law, in this case; and moreover your pet'r charges that he is illegally held & detained in said penitentiary, because the legislature of the State of West Virginia has never passed any statute or given its consent to receive prisoners of the U. S. convicted of crime in its penitentiary, & that said State of West Virginia was not within the category of States from which he was author-
9 ized to designate, & that the attempt of the directors of said penitentiary to contract with the Att'y-Gen'l is without validity, & absolutely beyond its legitimate powers, & null & void; all which will more fully appear by Exhibits X & Z.

Your pet'r alleges that he is illegally sentenced and condemned to an ignominious & infamous imprisonment, contrary to & in violation of the terms & spirit of the statute under which he was indicted & found guilty, & that the penalties of convict treatment & discipline have been superadded, contrary to the Constitution of the U. S. & in violation of justice and law. Your pet'r alleges further that he is now in the custody of Wm. L. Bridges, superintendent of the penitentiary of the State of West Virginia, at Moundsville, & illegally
10 deprived of his liberty, & treated as a convict therein, and that said superintendent pretends to hold your pet'r by virtue of said illegal sentence, designation, and order of commitment, & under color of authority of the U. S., a copy of which is hereto annexed & marked "Exhibit A," & pet'r specially charges that the execution of the sentence against y'r pet'r in said penitentiary is unwarranted, illegal, null, & void, for the reasons stated, & that the superintendent of said penitentiary has no lawful right or authority for pet'r's detention therein.

Pet'r moreover alleges that the sentence & execution are
11 illegal, because said circuit court exceeded its powers and jurisdiction in the premises as defined by law, and the Att'y-General was utterly without power and had no right to designate any penitentiary in pet'r's case, as stated in the sentence & designation to the court, wherein pet'r should be incarcerated, & consequently the acts and events which have occurred since the finding of the jury, including

the said illegal sentence, & especially the partial execution thereof by imprisonment in the parish jail of New Orleans, your pet'r claims he is & becomes entitled to his liberty. And furthermore, pet'r charges that the order of imprisonment is deficient in the legal requisites, because it adds new, infamous, & onerous penalties not sanctioned
12 or named in the law under which pet'r was convicted & condemned, & which are unauthorized by the statutes of the United States in such cases, & that said sentence is being executed by said superintendent, who is a person not authorized for this purpose, & said person is not the person to whom the law has prescribed the duty of imprisoning him.

Your pet'r lastly alleges that he has no other legal means of getting relief except by the writ of habeas corpus.

Wherefore the pet'r prays that, the premises, laws, affidavits, exhibits, &c., being considered, your honor will be pleased to issue the great writ of habeas corpus, directed to William L. Bridges, the superintendent of the penitentiary at Moundsville, West Virginia,
13 commanding him to appear & produce the body of John Henderson, & ordered to make due return thereof within days thereafter, to wit, on the , 1876, before the honorable justices of the S. C. of the U. S., and that after due proceedings had y'r pet'r have judgment in his favor maintaining said writ, & setting him at liberty & relieving him from said imprisonment & fine, & for all other general relief, as he may be entitled to, & pet'r will ever pray, &c.

JOHN HENDERSON.

THE UNITED STATES OF AMERICA,
District of West Virginia, set:

I, James P. Rogers, a U. S. commissioner, duly appointed and qualified as such within and for the district of West Virginia, do
14 hereby certify that John Henderson, whose name is signed to the annexed and foregoing petition, this day personally appeared before me in my said district, and made solemn oath upon the Holy Evangely of Almighty God that the facts and allegations in the above petition by him subscribed contained are true, so far as they are stated on his, this affiant's, knowledge, and that, so far as they are stated upon information, be believes them to be true.

JOHN HENDERSON.

Sworn to and subscribed before me, in my said district, this 15th day of November, 1876.

JAMES P. ROGERS,
U. S. Commissioner.

IN THE MATTER OF OTTO H. KARSTENDICK & John Henderson, praying for writs of habeas corpus. } No. 735 & 736.

Whereas doubts have arisen as to the jurisdiction of the S. C.
15 on the appeals as taken & now on file, & whereas the parties applying for the writ have the right to make new & direct application to the Supreme Court of the U. S. for issuance of the writ: Now, in order to save costs, it is hereby agreed between the parties hereto that the petition & exhibits be deemed to be a direct application to the court, & considered as reiterated & sworn to, & that

a preliminary order has been issued to show cause, & the case regularly before the court on the merits for adjudication, and that the parties hereto will abide by the decision to be rendered on the issues thus presented, making the transcripts filed to stand in lieu of the required petition, exhibits, & return, of a new and direct application to the court under the act of 1789 & other laws of Congress.

S. F. PHILLIPS,
Sol. Gen'l, &c., for the United States.

Washington, Oct., 1876.

D. C. LABATT,
Atty. for Relators.

N. O., Oct. 27, 1876.

O

TRANSCRIPT OF RECORD.

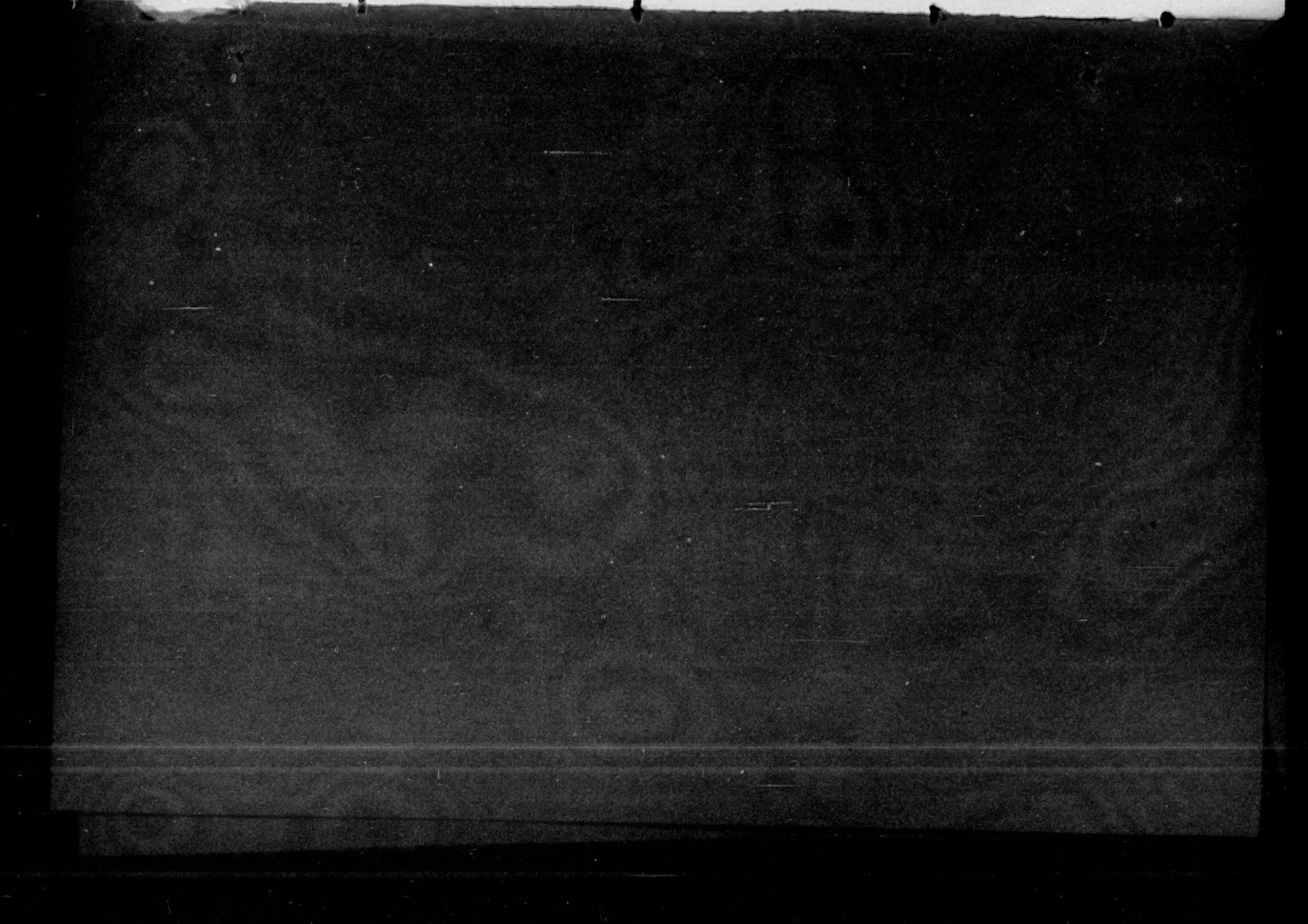
SUPREME COURT OF THE UNITED STATES.

No. 736.

EX PARTE IN THE MATTER OF JOHN HENDERSON, PETITIONER, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED OCTOBER 3, 1876.



SUPREME COURT OF THE UNITED STATES.

No. 736.

EX PARTE IN THE MATTER OF JOHN HENDERSON, PETITIONER, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the city of Baltimore on the first Monday of April, (being the third day of the same month,) in the year of our Lord one thousand eight hundred and seventy-six.

Present: the honorable Hugh L. Bond, circuit judge; Archibald Stirling, jun., esquire, attorney; Edward Y. Goldsborough, esquire, marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

PETITION OF JOHN HENDERSON FOR HABEAS corpus. Ex parte.

Be it remembered that, on the 19th day September, in the year of our Lord 1876, the said John Henderson, by David C. Labatt, his attorney, filed in the circuit court of the United States for the fourth circuit in and for the Maryland district the following petition, transcript, and order, to wit:

To the honorable Morrison R. Waite, Ch. Justice of the Supreme Court of the United States of America:

2 The petition of John Henderson, a citizen of the State of Louisiana, with respect, humbly represents—

That your pet'n'r was recently indicted in the circuit court of the United States for the district & circuit of Louisiana, at New Orleans, under section 5440 Revised Statutes of the United States, for a conspiracy to commit an offence, or to defraud the United States, for which the punishment is defined as follows:

"All the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not over two years."

That under said indictment petitioner plead "not guilty," and was tried by a jury, who rendered a verdict of guilty on said charge, and that by virtue thereof the honorable W. B. Woods, sole presiding judge of the said circuit court, on the second day of June, 1876, rendered judgment & signed the sentence, as per Exhibit A, made part hereof, & as will more fully appear by the exhibits marked, annexed, & made part hereof.

Now your pet'r alleges that, in execution of said sentence, the marshal of the United States at New Orleans first imprisoned him in the parish jail of New Orleans, La., & afterwards caused pet'r to be delivered over to the superintendent of the penitentiary at Moundsville, in the State of West Virginia, and your pet'r is now incarcerated

3 therein, & illegally deprived of his liberty, and daily subjected to its penitentiary discipline, rules, & regulations without warrant of law or competent authority, and for the term of sixteen months, from the 2d day of June, 1876, & to pay a fine of six thousand dollars; all in direct conflict with the following statute of the United States, to wit:

Sec. 5541 of the Revised Statutes of the United States providing as follows: "In every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period

longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.'

Now, your pet'r further shows that by Exhibit B, also annexed & made part hereof, the legislature of the State of Louisiana passed a statute in 1814, & re-enacted in 1870, which was & now is in full force, in the following words, to wit:

"All the sheriffs, jailors, prison-keepers, and their deputies, within this State, to whom any person shall be sent or committed by the marshal of the district of Louisiana or his deputies, under the authority of the United States, whether in civil or criminal process, or upon any process or warrant which may be issued by the President of the
4 United States, or to those to whom he may delegate authority, for any cause whatever, under the law of the United States, shall be, and they are hereby, enjoined & required to receive such prisoners into custody, & keep the same safely until they shall be discharged by due course of law; and all such sheriffs, jailors, prison-keepers, and their deputies offending in the premises shall be liable to the same pains & penalties, and the parties aggrieved shall be entitled to the same remedies against them, or any of them, as if such prisoners had been committed to their custody by virtue of legal process issued under the authority of this State."

Pet'r further alleges that by virtue of said statute he was actually handed over to and was imprisoned in the parish jail of New Orleans, and remained in its custody under said sentence for several weeks before his illegal removal to the said penitentiary at Moundsville, West Virginia; all which will more fully appear by Exhibit C, hereto annexed & made part hereof, & that his removal therefrom, & his incarceration in said penitentiary, and his subjection to its rules, regulations, & discipline, are oppressive, illegal, & unwarranted.

Your pet'r denies that there is any law to authorize the Attorney-General of the United States or the circuit court aforesaid to order or designate in such a case as this your pet'n'r to be imprisoned in the penitentiary at Moundsville, West Virginia, or any penitentiary at any other place, for his imprisonment, employment, and confinement
5 under said indictment, finding of the jury, statute, or sentence; but, on the contrary, pet'r alleges that the authority of the Attorney-General or the said court to designate a jail or penitentiary is limited & special, & that it is a power qualified & coupled with conditions-precedent which do not exist & destroy the power, & which said Att'y-General or said court could only exercise in case the State of Louisiana had not made provisions for receiving, or refused the use of its jails or penitentiary to, prisoners of the United States, and that said Att'y-General has therefore misconstrued or usurped authority, & exceeded his powers & duties as defined by law in this case; and, moreover, your pet'r charges that he is illegally held & detained in said penitentiary, because the legislature of the State of West Virginia has never passed any statute or given its consent to receive prisoners of the U. S., convicted of crime, in its penitentiary, & that the attempt of the directors of said penitentiary to contract with the Attorney-Gen'l is without validity, & absolutely beyond its powers, & null & void; all which will more fully appear by Exhibits X & Z.

Your pet'r alleges that he is illegally sentenced and condemned to an ignominious & infamous imprisonment, contrary to and in violation

of the terms and spirit of the statute under which he was indicted & found guilty, & that the penalties of convict treatment & discipline have been superadded, contrary to the Constitution of the
6 U. S., & in violation of justice and law.

Your pet'r alleges further that he is now in the custody of William L. Bridges, superintendent of the penitentiary of the State of West Virginia, at Moundsville, & illegally deprived of his liberty, & treated as a convict therein, & that said superintendent pretends to hold your pet'r by virtue of said illegal sentence, designation, and order of commitment, & under color of authority of the United States, a copy of which is hereto annexed, and marked "Exhibit A;" and pet'r specially charges that the execution of the sentence against your pet'r is unwarranted, illegal, null & void, for the reasons herein stated, & that the superintendent of said penitentiary has no lawful right or authority for petitioner's detention in said penitentiary. Pet'r moreover alleges that the sentence and execution are illegal, because the said circuit court exceeded its powers and jurisdiction in the premises as defined by law, and the Attorney-General was utterly without power & had no right to designate any penitentiary, in petr's case, as stated in the sentence & designation to the court, wherein pet'r should be incarcerated, & consequently the acts & events which have occurred since the finding of the jury, including the said illegal sentence, & especially the partial execution thereof by imprisonment in the parish jail of New Orleans, your pet'r humbly claims he is & becomes entitled to his liberty.

7 And, furthermore, pet'r charges that the order of imprisonment is deficient in the legal requisites, because it adds new, infamous, & onerous penalties not sanctioned or named in the law under which pet'r was convicted and condemned, & which are unauthorized by the statutes of the United States in such cases, & that said sentence is being executed by said superintendent, who is a person not authorized for this purpose, & said person is not the person to whom the law has prescribed the duty of imprisoning him.

Your pet'r lastly alleges that he has no other legal means of getting relief except by the writ of habeas corpus.

Wherefore pet'r prays that, the premises, laws, affidavits, exhibits, &c., being considered, your honor will be pleased to issue the great writ of habeas corpus, directed to said William L. Bridges, the superintendent of the penitentiary at Moundsville, West Virginia, commanding him to appear & produce the body of John Henderson, & ordered to make due return thereof within days thereafter, to wit, on the at , before the Hon. , justice of the Supreme Court of the United States; & that, after due proceedings had, your pet'r have judgment in his favor, setting him at liberty, & relieving him from said imprisonment & fine, & for all other general & equitable relief as he may be entitled to; & pet'r will ever pray, &c.

8 JOHN HENDERSON.

THE UNITED STATES OF AMERICA,
District of West Virginia, sct.:

On this 1st day of August, A. D. 1876, before me, James P. Rogers, a United States commissioner within and for the district of West Virginia, duly appointed and qualified as such, personally appeared John Henderson, and made solemn oath, in due form of law, that the facts and allegations over his genuine signature affixed to the annexed and foregoing petition, and the allegations set out in the said petition, so far as

the same are stated upon his own knowledge, are true, and that so far as the same are stated upon information he believes them to be true.

JOHN HENDERSON.

Subscribed and sworn to before me, in my said district, this 1st day of August, 1876.

JAMES P. ROGERS,
U. S. Commissioner in and for the District of West Va.

UNITED STATES OF AMERICA.
Circuit court of the United States, fifth circuit and district of Louisiana.

UNITED STATES
vs.
DENNIS C'BRINE ET AL. } No. 512.

9 *Indictment.—Filed April 8th*, 1876.

UNITED STATES OF AMERICA,
District of Louisiana.

In the circuit court of the United States in and for the fifth circuit and district of Louisiana, of the November term thereof, A. D. 1875.

The grand jurors of the United States of America, duly empanelled, sworn, and charged to enquire in and for the district of Louisiana, on their oath, present: That Dennis O'Brine, yeoman; John Henderson, merchant; John Henderson, merchant, sometimes called John Henderson, junior; Waldo P. Todd, yeoman; Alexander McKee, yeoman; William A. Thomas, yeoman; William G. James, yeoman; John McWhirter, yeoman; and Charles W. Wills, yeoman, all late of the district of Louisiana, on the ninth day of April, in the year of our Lord eighteen hundred and seventy-four, at the city of New Orleans, in the district of Louisiana aforesaid, with force and arms fraudulently and unlawfully did combine, conspire, confederate, and agree together and amongst themselves and with divers other evil minded and disposed persons, to the jurors aforesaid at present unknown, the said United States of America then and there to defraud of a large sum of money of the revenue of the said United States, to wit, of the internal-revenue
10 tax of seventy cents, then and there imposed by the statute of the United States in such case made and provided, upon each and every proof-gallon of a large quantity of distilled spirits, to wit, two hundred thousand proof-gallons of distilled spirits, thereafter to be produced at a certain distillery then and there situate in the first internal-revenue collection district in and of the said State of Louisiana, and within said district of Louisiana, which said distillery was then and there occupied and operated by the said defendant Dennis O'Brine, the same being the distillery of the said Dennis O'Brine, situate as aforesaid, and within the jurisdiction of this court.

That in furtherance of said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement as aforesaid, afterwards, to wit, on the tenth day of April, in the year of our Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situate within the district

of Louisiana as aforesaid, remove or cause to be removed to a place other than the distillery-warehouse situate upon and constituting a
11 part of said distillery-premises, to wit, to a certain building in the near vicinity of the said building in which the said Dennis O'Brine so then and there carried on his said business of producing distilled spirits, to wit, the distillery aforesaid, the precise and accurate description of which said building to which said distilled spirits was so unlawfully removed as aforesaid is to the said jurors unknown, to wit, two thousand proof-gallons of distilled spirits, upon which said two thousand gallons of distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said two thousand proof-gallons of distilled spirits, then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of the said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every gallon of the said two thousand proof-gallons of distilled
12 spirits aforesaid did attempt to cheat and defraud.

That in furtherance of the said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the ninth day of April, in the year of Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situate within the district of Louisiana as aforesaid, remove or cause to be removed to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of distilled spirits, to wit, twenty thousand other proof-gallons of distilled spirits, upon which said twenty thousand gallons of distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said twenty thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said
13 United States of America by virtue of the said statute of the United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and defraud.

That in furtherance of said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the tenth day of April, in the year of Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and

fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district of Louisiana as aforesaid, remove or cause to be removed to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of distilled spirits, to wit, twenty
14 thousand other proof-gallons of distilled spirits, upon which said twenty thousand gallons of distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said twenty thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of the said statute of the United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and defraud.

That in furtherance of the said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the fourteenth day of April, in the year of Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlaw-
15 fully and fraudulently from the distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district of Louisiana as aforesaid, remove or cause to be removed to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of distilled spirits, to wit, twenty thousand other proof-gallons of distilled spirits, upon which said twenty thousand gallons of distilled spirits, and upon each and every proof gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said twenty thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of the said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to the said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and de-
16 fraud, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

And the jurors aforesaid, on their oath aforesaid, do further present: That Dennis O'Brine, John Henderson, John Henderson sometimes called John Henderson, junior, Waldo P. Todd, Alexander McKee, William A. Thomas, William G. James, John McWhirter, and Charles W. Wills, on the first day of May, in the year of our Lord eighteen hundred and seventy-four, at the city of New Orleans, in the district of

Louisiana aforesaid, with force and arms fraudulently and unlawfully did combine, conspire, confederate, and agree together and amongst themselves and with divers other evil-minded and disposed persons, to the jurors aforesaid at present unknown, the said United States of America then and there to defraud of a large sum of money, to wit, of the internal-revenue tax of seventy cents, then and there imposed by the statute of the United States in such case made and provided, upon each and every proof-gallon of a large quantity of distilled spirits, to wit, one hundred thousand proof-gallons of distilled spirits, before that time produced at a certain distillery then and there situate in the first internal-revenue collection-district in and of the said State of Louisiana, and within said district of Louisiana, which said distillery was then and there occupied and operated by the said defendant Dennis O'Brine,
17 the same being the distillery of the said Dennis O'Brine, situate as aforesaid within the district of Louisiana aforesaid, and within the jurisdiction of this court.

That in futherance of said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement as aforesaid, afterwards, to wit, on the tenth day of April, in the year of our Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district of Louisiana as aforesaid, remove or caused to be removed to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a certain building in the near vicinity of the said building in which said Dennis O'Brine so then and there carried on his said business of producing distilled spirits, to wit, the distillery aforesaid, the precise and accurate description of which said distilled spirits *was* so unlawfully removed as aforesaid is to the said jurors unknown, to wit, two thousand proof-gallons of distilled spirits, upon which said two thousand gallons of distilled spirits, and upon
18 each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon the said two thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of the said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every gallon of the said two thousand proof-gallons of distilled spirits aforesaid did attempt to cheat and fraud.

That in furtherance of the said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the fifteenth day of April, in the year of Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district
19 of Louisiana as aforesaid, remove or cause to be removed to a place

other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of distilled spirits, to wit, twenty thousand proof-gallons of distilled spirits, upon which said twenty thousand gallons of distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said twenty thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and defraud.

That in furtherance of the said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid,
20 and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the first day of May, in the year of Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district of Louisiana as aforesaid, remove or caused to be removed to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of distilled spirits, to wit, twenty thousand other proof-gallons of distilled spirits, upon which said twenty thousand gallons distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said twenty thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of the said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means afore-
21 said, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and defraud.

That in furtherance of the said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the second day of May, in the year of Lord, eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district of Louisiana as aforesaid, remove or caused to be removed to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors

aforesaid unknown, a large quantity of distilled spirits, to wit, twenty thousand other proof-gallons of distilled spirits, upon which said twenty thousand gallons of distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each
22 and every gallon of the said twenty thousand proof gallons of distilled spirits then and there imposed thereon by the statute of the United States of America, in such case made and provided, and to which said United States of America by virtue of the said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and defraud.

That, in furtherance of the said combination, conspiracy, and unlawful agreement so had between the said defendants as aforesaid, and to effect the object of the said combination, conspiracy, and agreement aforesaid, afterwards, to wit, on the second day of May, in the year of Lord eighteen hundred and seventy-four, at and within the district of Louisiana aforesaid, and within the jurisdiction of this court, the said defendant Dennis O'Brine did then and there unlawfully and fraudulently from the said distillery of him, the said defendant Dennis O'Brine aforesaid, said distillery being then and there situated within the district of Louisiana as aforesaid, remove or cause to be re-
23 moved to a place other than the distillery-warehouse situate upon and constituting a part of said distillery-premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of distilled spirits, to wit, twenty thousand other proof-gallons of distilled spirits, upon which said twenty thousand gallons of distilled spirits, and upon each and every proof-gallon thereof, the internal-revenue tax of seventy cents upon each and every gallon of the said twenty thousand proof-gallons of distilled spirits then and there imposed thereon by the statute of the United States of America in such case made and provided, and to which said United States of America by virtue of the said statute of the said United States in such case made and provided was then and there entitled to have and receive, had not then and there been first paid to said United States of America, and then and there in the manner aforesaid, by the means aforesaid, at the time and place last aforesaid, the said United States of the said tax so imposed by the law of the United States upon each and every of the said twenty thousand proof-gallons of distilled spirits aforesaid did cheat and defraud.

Contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

(Signed) J. R. BECKWITH,
U. S. Atty.

24 (Endorsed:) A true bill. Silas Weeks, foreman.

(November term, 1875.)

NEW ORLEANS, *Monday, April 10th*, 1875.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, circuit judge.

On motion of the U. S. attorney, it is ordered that the letter this day received from the Attorney-General of the U. S. be filed and spread upon the minutes; and it is as follows, viz:

DEPARTMENT OF JUSTICE,
Washington, April 1st, 1876.

J. R. BECKWITH, Esq.,
U. S. Attorney, New Orleans, La.:

SIR: Under the authority granted by section 5546 of the Revised Statutes of the United States, I designate the penitentiary at Moundsville, in West Virginia, as the place for the confinement, subsistence, and employment of all persons convicted by the courts of the United States for the district of Louisiana of crime against the United States, and sentenced by said courts to imprisonment longer than a year, on and after this instant. You will bring this designation to the
25 notice of the courts and have this order entered, if possible, upon the records.

Very respectfully,

EDW. PIERREPONT,
Attorney-General.

(April term, 1876.)

NEW ORLEANS, *Tuesday, June 2d*, 1876.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, circuit judge.

UNITED STATES
vs. } No. 512.
DENNIS O'BRINE ET AL.

And the said John Henderson and William G. James were this day called to the bar of the court for judgment upon the verdict of the said jury upon the matters charged against them in the said indictment as found by the said jury, and of record herein, and being respectively enquired of by the court whether they or either of them could anything say why the sentence of the court should not be pronounced against them in this behalf, and the said John Henderson and William G. James and each of them being unable to show and make known any good and sufficient reason in law why judgment should not be pronounced
26 against him; and it having been in due form determined and ascertained that there is no penitentiary within the district of Louisiana suitable for the confinement of persons convicted of crime in the courts of the United States in said district of Louisiana, and the Attorney-General of the United States having in due form, and by and with competent authority, designated the penitentiary at Moundsville, in West Virginia, as the place of confinement, subsistence, and employment of all persons convicted, or who may hereafter be convicted, by the courts of the United States of crime against the United States of America in said district of Louisiana, and such designation having been in due form notified to the court and entered on the record thereof:

It is considered, by reason of the verdict herein, that the said John Henderson be confined in the penitentiary of the State of West Virginia, at Moundsville, in said State, for and during the period of sixteen calendar months from and after this day, and the said John Henderson do further pay a fine of six thousand dollars and one-half of the costs of this prosecution; and that the said William G. James be confined in the said penitentiary aforesaid for and during the full period of sixteen calendar months from and after this day, and that he, the said William G. James, do also
27 further pay a fine of one thousand dollars, and the remaining one-half of the costs of the prosecution, the said costs of prosecution

being taxed in full at one hundred and four $\frac{45}{100}$ dollars, of which the one-half is $52\frac{22\frac{1}{2}}{100}$ dollars; and that the said United States have execution in due form against the respective property of the said John Henderson and William G. James for the said fine and costs taxed against them respectively, and that this marshal cause this sentence to be executed as to the said John Henderson and the said William G. James respectively.

CLERK'S OFFICE.

I certify the foregoing to be true copies of the indictment and sentence in the case of The United States versus Dennis O'Brine et al., No. 512, of the docket of this court, and a true copy of the letter of Attorney-General of the United States designating place for confinement, &c., of persons convicted in the U. S. courts for the district of Louisiana, on file and of record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 25th day of July, 1876.

[PLACE OF SEAL.] F. B. VINOT,
Dy. Clerk.

28 IN THE MATTER OF THE APPLICATION of John Henderson for a writ of habeas corpus.

This application is refused for the reasons assigned in the case of Otto H. Karstendick, submitted at the same time.

WAITE, *Ch. J.*

SEPT. 4*th*, 1876.

Appeal allowed to the circuit court for the district of Maryland.

WAITE, *Ch. J.*

SEPT. 4*th*, 1876.

Which being read and heard, the circuit court here passed the following order, to wit:

In the circuit court of the United States for dist. of Md.

IN THE MATTER OF THE APPLICATION OF John Henderson for habeas corpus. } Appeal from order of Ch. J. Waite, refusing writ.

The application in this case for a writ of habeas corpus is hereby refused.

HUGH L. BOND.

And the said petitioner, by his attorney aforesaid, filed the following prayer for appeal:

29 Pet'r respectfully prays an appeal to the Supreme Court at Washington, D. C.

D. C. LABATT,
Of Counsel.

Whereupon the circuit court here passed the following order, to wit: An appeal is granted in the above case to the Supreme Court of the U. S., returnable at Washington, D. C., on the 2d Monday of Oct., 1876, & in the mean time the applicant to remain in custody.

HUGH L. BOND.

SEPT. 19*th*, 1876.

In pursuance whereof, and according to the statute in such case made and provided, a record of the proceedings aforesaid, with all things thereunto relating, is hereby transmitted to the Supreme Court of the United States, to be held at Washington on the second Monday in October next, accordingly.

I hereby certify that the aforegoing is a true copy of the record and proceedings of the said circuit court in the case aforesaid.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this twenty-ninth day of September, A. D. 1876.

[SEAL.]

JAMES W. CHEW,
Clerk Circuit Court.

(Indorsement on cover:) No. 736. Ex parte in the matter of John Henderson, petitioner, appellant. Maryland C. C. U. S. Filed 3rd October, 1876.

O

IN THE SUPREME COURT OF THE UNITED STATES.

Appeal from the U S. Circuit Court of Maryland.

EX RELATIONE OTTO H. KARSTENDIEK

AND JOHN HENDERSON.

ON PETITIONS FOR WRITS OF HABEAS CORPUS.

DAVID C. LABATT.

A. W. Hyatt, Print, 38 Camp St., N. O.

IN THE SUPREME COURT OF THE UNITED STATES.

Appeal from the U. S. Circuit Court of Maryland.

EX RELATIONE OTTO H. KARSTENDIEK AND JOHN HENDERSON.

ON PETITIONS FOR WRITS OF HABEAS CORPUS.

Before discussing the merits of this application, it is proper to state, that this is an appeal from a decision of the Circuit Court of the United States for the District of Maryland, affirming the refusal of the Chief Justice to grant writs of habeas corpus, exparte Otto H. Karstendiek and John Henderson, citizens of Louisiana, imprisoned in the penitentiary of the State of West Virginia, at Moundsville, by virtue of a sentence and commitment of Hon. W. B. Woods, Judge of the United States Circuit Court in Louisiana. The exhibits annexed to the petition fully sustain all its allegations. In attempting to question the conclusions of the learned Chief Justice, we appreciate fully the difficulty of the task; but when we

reflect that in matters of intricate statute law, no human judgment is infallible, we defferentially appeal for a reversal to the learning, ability and impartiality which has ever distinguished the judicial career of this august tribunal.

The applicant makes the following points:

1st. That the section 5440 only makes him amenable to fine and imprisonment in a State jail or penitentiary, at the discretion of the judge; but the statute is peremptory as to the place of confinement in the State where he is tried, when that State, *by its Legislature*, has consented to the reception of federal prisoners, *evidenced by a public statute*, and that section 5541, although discretionary as to State jail or penitentiary, is positive and peremptory, and not merely permissive, as to the *one* or the *other*. In other words, our contention is that the Judge *must, in every case*, like this, send the prisoner either to a "State jail or penitentiary," and if he finds that there is no penitentiary in the State, he has no other alternative but to send him to the State jail, unless that is also found unsuitable or unavailable. In this case the Judge found that the penitentiary only was unsuitable, and exercised the function conferred on the Attorney General alone.

2d. That the statute nowhere lodges with the Circuit Judge the power to decide as to the suitableness of the State jail or penitentiary, and no power of "designation" is conferred upon him. His duty is simply to sentence the prisoner according to the statute and the *locus peni-*

tentiæ is to be ascertained by the Marshal in accordance with the statutes of Louisiana and the previous uniform conduct of the United States Government in similar cases for sixty years. If the State jail or penitentiary is unsuitable or unavailable, then the power of designation, as an executive power, is expressly lodged with the Attorney General, who may *shift* the prisoner to another State or territory convenient, etc., all which is a provision for contingencies, and clearly presupposes sentence and execution in some jail or penitentiary in the State deemed by him unsuitable or unavailable, after and not deemed by him unsuitable, before conviction and sentence.

3d. That the power conferred on the Attorney General clearly points to the designation of some, *other State "jail or penitentiary," whose State Legislature has consented by statute to receive federal prisoners*, and not to a State which declines to express its consent in that solemn form, and that any State Legislature which remains silent is considered as objecting, and is deemed in law to be prohibiting her subordinates from forming any contract to supply such consent.

It is analogous to the legislation required for permitting the United States to possess customhouses, dockyards and arsenals in a State; and no contract made by the Attorney General with even a Governor, would confer title or exclusive jurisdiction by mere silence or inaction. Besides, the power of designation does not involve the power to *adopt*, *create* or *erect* a penitentiary wherever he pleases; that to permit him or the judge, under the

illegal contract in this case, to transport prisoners from Louisiana to WestVirginia, is tantamount to the *adoption*, *erection* or *creation* of a State penitentiary for federal prisoners, without any warrant of law or the proper consent of the sovereign power of the State; and is to do indirectly what cannot be done directly, in violation of the act of Congress and the reserved right of the States. If the prisoners had been found guilty in West Virginia and sent by the judge of West Virginia to Col. Bridges, superintendent of the penitentiary, for imprisonment, he was undeniably without the authority or consent of the State Legislature to receive them, because his principal had never passed the required statute, exacted by the language and the spirit of the act of Congress, as solely indicative of the consent of a sovereign State on that question. No proposition can be clearer than that a State jail or State penitentiary is closed to the Federal Government unless their doors are opened by *proper statutes of the Legislature*, and the officers made responsible for such prisoners as if sent there by the State. The character of the statute of Louisiana and the cotemporaneous acts of other States, exhibit conclusive evidence of the respect paid by the General Government to this supreme or reserved right of the State over her prisons, and the statutes themselves evince internal evidence of the provisions deemed acceptable to the General Government by way of comity. That the Attoney General's designation, neither in spirit or terms, applied to these prisoners, because under the statute and finding of the

judge, they could only be imprisoned in a State jail, and were not persons convicted and liable to penitentiary on the first April, 1876, and were only convicted and sentenced two months afterwards.

We propose to submit our reasons and authorities in support of the points made. Upon the first point the Sec. 5541, Rev. Statutes says: "*In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the Court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the State for that purpose.*" This language is clear and explicit. It means, indisputably, that the criminal must be sent to a State jail or penitentiary where he is convicted. If there is no penitentiary, then the State jail. If there is no State jail, then the penitentiary, and where there is neither, then the Attorney General may designate in a convenient State, whose State Legislature permits their use, in accordance with the sentence; but his transportation is conditioned upon the absence of *both*, and not one, of these places.

The following authorities, 3 Hill Rep., N. Y., 612; Mayer vs. Mayo; 2 Salk., 609; Carth., 293; 5th John Ch. R., 213; 5th Cowen, 188; 1 Peters, 64; establish that this statute is peremptory, because *may* means *shall* or *must* and only discretionary as to one place or the other, in the State, where the prisoners were tried, Louisiana hav-

ing by statute opened her jails and penitentiary to the United States. Now, conceding, merely for the sake of argument, that the judge has the right to hear and determine the question as to the suitability of the jails or penitentiary, and that his finding is conclusive, then, we submit that he has only found that there was no suitable penitentiary, and this left him absolutely obliged to select a Louisiana jail in his district for execution of the sentence. It must be *one* or the *other;* suppose he finds there is no *other*, is he not obliged to select the only option left? Does not this fact make the Louisiana State jail, "Hobson's choice?" Does the judgment find that there was no suitable State jail? We say it does not. Does the Attorney General's circular letter find that there was no suitable Louisiana jail? We say it does not. What do the Codifiers say, when they substituted the words "jail" for "prison"? On the side the Codifiers say "sentences to imprisonment for more than a year, where to be executed," and as to Sec. 5542, which speaks of higher crimes, to-wit: *sentences to imprisonment and confinement at hard labor*, they say: "Penitentiaries, sentences where executed," plainly showing that they made the substitution to suit the fitness of things, and establish a distinction between a "jail" and a "penitentiary," and although we concede, that under the words ignoring the fitness of things, the judge is granted an option or discretion under Sec. 5541 of either jail or penitentiary, yet when he finds there is no penitentiary, then it was the will of Congress such person must be imprisoned in the

State jail and not a distant penitentiary. And why is this? Because no enlightened jurisprudence fails to see that there are gradations in crime, and necessarily there must be gradations in punishments, as Blackstone says: 4 vol., p. 17: "It has, therefore, been ingeniously proposed that in every State a scale of crimes should be framed with a corresponding scale of punishments, descending from the greatest to the least, but if that be too romantic an idea, yet at least a wise legislator *will mark the principal divisions and not assign penalties of the first degree to offences of an inferior rank*; where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt," and in 3d vol., p. 133, he says: "But the glory of the English law consists in clearly defining the times, the causes and the extent *when*, *wherefore*, and to *what degree*, the imprisonment of the subject may be lawful."

"This it is which induces the absolute necessity of stating upon every commitment, the reason for which it is made, that the Court upon a habeas corpus may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail or remand the prisoner." In the case at bar we show that the cause of commitment which immures relator in a felon's cell, and dooms him to confinement and employment at hard labor in a distant State penitentiary, arises from an erroneous sentence, supported by an unlawful and unwarranted private contract between the Attorney General of the United States

on one side, and a subordinate agent of the State of West Virginia on the other, unsanctioned by the Legislature of the State, and beyond the mandate in the act organizing the Board of Public Works, and which changes relator's punishment, as announced by the statute, from mere imprisonment in a State jail, to the infamous and degrading convict of a distant State penitentiary, involving civil death, hard labor, the disruption of all private contracts, and by express local law of Louisiana, actually dissolving the marriage tie. (See Statutes of La., p. 236, Sect. 1190), as follows:

"The condemnation of one of the married persons to an *ignominious punishment* shall be for the other sufficient cause for divorce."

We trust it is equally the glory of American law and liberty that the Government of the United States and each of its officers exist by virtue of expressly delegated and limited powers. It must not be despotic. "It derives its existence and authorities altogether from the Constitution and neither of its branches, Executive, Legislative or Judicial, can exercise any of the powers of government beyond those specified and granted." (Ch. J. Taney, in the Merryman case). In 21 Howard R., 506, Judge Taney said: "*No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the Court or judge by whom it is issued, and an attempt to enforce beyond these boundaries is nothing less than lawless violence.*" See, also, 13 op. Attorney General Bristow, p. 453.

Yet here we present for your Honor's consideration a case where a subordinate official of West Virginia holds two citizens of Louisiana in a penitentiary entirely by virtue of a commitment of Judge Woods, whose judicial authority is circumscribed by the territory of Louisiana, and beyond which it is unknown and unofficial. It cannot be said that this is incorrect, and that he holds them by virtue of the contract with the Attorney General and designation embodied in the sentence, because neither of these would be sufficient without the judicial sentence of Judge Woods, and there is no law that we can discover which gives vitality to his commitment outside of his judicial territory; but on the contrary, it is denounced by Judge Taney and Attorney General Bristow, as nothing short of "lawless violence," whatever form it may assume.

We urge upon your Honors' attention, the important fact that the Chief Justice, in his decision, nowhere examines or decides the point which we now press; that under the circumstances stated in the sentence, Judge Woods had no alternative but to commit the prisoners to the State jail according to the statute. (See 5541.) The opinion merely declares that it was discretionary in the Circuit Judge to send relator to a penitentiary; that the judge found there was none suitable in Louisiana; therefore he had the right to adopt the penitentiary at Moundsville, designated by the Attorney General; but he does not decide that there was any finding, establishing that there was no suitable "*State jail*," which was as

much a *condition precedent* to authorize the designation, as was the non-finding of a suitable penitentiary. Conceding, then, all that is claimed for the conclusive character of this finding, it only establishes more distinctly, the obligation either to find the other fact also, or to send the prisoner to a State jail according to the behests of the statute.

It cannot be disputed, that it is in accordance with the traditional history of our existence as a government and the genius of our institutions, that the rule is that a criminal should expiate any public offence, of which he is found guilty, within the jurisdiction, where he is tried and convicted, and this principle is consecrated in the statutes applicable to the relator's case. Our contention is that where two places of confinement are pointed out distinctly, either of which may be adopted in the State, where the prisoner is tried and convicted by the judge, before the statute of1872, (Sec. 5546,) can have any application as a "proviso" to send him outside of the State, the judge, as well as the Attorney General, must ascertain and declare that there is neither "suitable jail" nor "suitable penitentiary." Because *non-constat*, there was not the "*one*," that there was not the "*other*" and these findings should not be presumed in matters of criminal law which are "*stricti juris.*" To do so, would violate the law, as pronounced in the statute, and leave the important question of where a prisoner should be punished and how he should be incarcerated, lodged in the breast of the judge. Thus Black-

† See Deybels Case 413 ⁂ 243
" Nash " 413 ⁂ 295
" Londen's " 413 ⁂ 294

stone says: vol. 4th, p. 377. "*The Court must pronounce that judgment which the law hath annexed to the crime,*" and he proudly boasts of the glory of English law, that "the quantity or degree of punishment is ascertained for every offence, and that it is not *left in the breast of any judge nor even of a jury*, to alter that judgment which the law has beforehand ordained, for every subject alike, without respect of persons, because, where an established penalty is annexed to crimes, the criminal may read their certain consequences in that law, which ought to be the unvaried rule as it is the inflexible judge of his actions. "Well may a criminal say to his incarceration in the wrong place as cause of nullity of his commitment there: "*Non in hæc fœdera veni.*" We deny the power of Congress to lodge with the Attorney General the judicial power to determine when and where prisoners of the United States shall be incarcerated. It may be true that in exceptional cases, when it is impossible or impracticable to adhere to the *rule* laid down of punishment, within the State where the prisoner is convicted, it could be conferred as an executive power, merely to *shift* the prisoner, for purposes of safety. There is then some good reason for making the alteration in the original statutes, between State prison and State jail. As they formerly stood the words "State prison and penitentiary," seemed synonymous; but there is a broad distinction between a jail and a modern penitentiary. (See Bouvier's L. Dict.) A jail is a place of confinement or safe keeping, commonly defined also as a prison and from which, however, it seems

properly to be distinguishable—a jail being a place of temporary confinement or of confinement for minor offences. A prison being a place of permanent confinement, a place of punishment for crimes. An essential difference between the terms is also imported in the common expressions "county jail" and "State prison." The distinction however is by no means strictly observed in statute law. Jail and prison being frequently used as synonymous. (See Burrill's Law Dict.) The word "prison is pure French, and is in modern law synonymous with jail, though in strictness *prison* properly signifies a place of punishment for crime, while jail is a place of safe keeping and detention. It is said, says Burrill, that prison originally signified merely a place of safe keeping and not of punishment, and to show this, reference is made to the observations of Lord Coke "*Carcer ad homines custodiendios non ad puniendos dari debet,*" a prison ought to be assigned for the custody of men, not for their punishment. Co. Littleton, 260, who cites from Bracton, fol. 105. By a reference to the context of Bracton, it will be found that the meaning of these words has been altogether misapprehended. In the first place, the chapter in which they are found is devoted to the subject of punishments, being entitled "De *generibus poenatum quibus homines afficiuntur propter eorum iniquitates* (of the kinds of punishments with which men are visited on account of their iniquities.) Bracton, lib. 3; tract, 1; C. 6. Under this head of punishments Bracton proceeds to enumerate, with others "*Corporis coertionem scilicit imprisonomentum, vel*

ad tempus vel inperpetuum, (coercion or restraint of the body, either for the time or perpetualy, that is for life.) He then remarks that a person should be punished in no other way than according to his sentence. (*Non alio modo puniatur quis quam secundum quod se habeat condempnatio.*) He states, however, that the keepers of prisons were in the habit of ordering those who were sentenced to imprisonment to be kept in chains, (*solent praesides in carcere continendos damnare ut in vinculis contineantur,*) but remarks that severities of this kind were condemned by law, because a prison ought to be kept (i. e., by those having charge;) as a place of custody and not of punishment, (*sedhujus modi interdicta sunt a lege, quia carcer ad continnendos et nen puniendos haberi debeat.*) (Bract, fol., 104, b. 105.) The whole drift of the chapter is to show that punishments should not be extended beyond their proper limits, and, particularly, that where imprisonment was inflicted as a punishment, it should be attended *with no unnecessary severities*. This explanation clearly leads to the conclusion that a prison was in Bracton's time, a *place of punishment*, as is directly shown, indeed, by other expressions of the same author, (*se pœna carceris*) (the punishment of the prison,) and by the verv common expression of Britton, (*puny par prison et par fyn.* (See Burrill's law dictionary,) verbo prison.

Having established, we trust, that the judge had no alternative but to sentence the prisoner to a State jail, if there was no suitable penitentiary in Louisiana, we now proceed to show that the Sec., 5546 did not authorize the

Attorney General to transport these prisoners to Moundsville, or any penitentiary at all, and that the Chief Justice erred in so deciding. He says: "Acting under this power, Congress, while recognizing as a rule the propriety of sentencing those convicts of crime against the United States to imprisonment in the jails or prisons of the States, where the conviction was had, did, in 1864, to meet contingencies that might arise, enact that all persons who have been or may hereafter be convicted of crime by any Court of the United States, not military, the punishment whereof shall be imprisonment in a district or territory where, at the *time of such conviction*, there may be no penitentiary or other prison suitable for the confinement of convicts of the United States, or available therefor, shall be confined during the term for which they have been or may be sentenced in some suitable prison in a convenient State or territory, to be designated by the Secretary of the Interior." 13 Stat., p. 74. In 1872 the power of designating was transferred to the Attorney General. This provision is also re-enacted in Sec. 5546 of the Rev. Statutes, the word "jail" being substituted for "other prison," and "suitable jail or penitentiary," for suitable prison, and he continues:

"This section is to be construed in connection with the other sections which have been referred to. In fact, it may be treated as a "proviso" to section 5541 and 5546. The counsel for the petitioner do not dispute the validity of this legislation, but they claim that, in this case, the conditions precedent to the execution of the sentence in a

prison outside of a State, have not been complied with, and, consequently, that the case is not brought within the power of the court to make such an order. It is first insisted, that as the State of Louisiana permits the use of its jails and penitentiaries for the punishment of criminals convicted in the Courts of the United States, the sentences of imprisonment by those courts cannot be executed elsewhere. It is not enough that the jails and penitentiaries of the State may be used; they must also be suitable. Whether suitable or not, is a question of fact. In this case, the court passing the sentence, has determined the question, and found that in the State of Louisiana there was no penitentiary suitable for the confinement of persons convicted of crime against the United States.

This finding is conclusive until reversed, and it cannot be reviewed in the form of proceeding, to justify a discharge under any writ to be issued upon this application. It must appear upon the face of the record that the order of commitment was void. The court also decided that under the circumstances of this case that the punishment should be "by imprisonment in a penitentiary." Now, we submit, that the finding of the court, even if conclusive, only applies to the Louisiana penitentiary, and is silent as to its jails, and that the finding of both being unsuitable, was quite as essential as the one to authorize the designation of a penitentiary outside the State to be made or adopted by the Judge or the Attorney General. The Chief Justice says, "it is not enough that the jails and penitentiaries of the State may be used. They

must also be suitable. Whether suitable or not, is a question of fact, and the court passing the sentence has determined this question, and found that in the State of Louisana there was no "penitentiary suitable for the confinement of persons," etc. Let this be granted, and, we ask, where, in the judgment, is there any finding that there was no "suitable" jail? Does the finding as to a suitable penitentiary, also exclude the existence of "suitable jails?" Clearly not; accepting the fact as found, did not it impose on the judge the clear duty of obeying the will of Congress as written, saying in this event, you must send the prisoner to the "State jail?" This demonstrates that on the face of the record the commitment was void. Neither can it be presumed that there was no suitable jail from the letter of designation of the Attorney General, because his selection of Moundsville, even if it were available or legal, applied to those persons for whose conviction, and at the time of conviction, only a penitentiary was provided by law for expiating their offence, while as to the relator's offence, one of two places, was fixed by statute and before the adoption of the designated penitentiary, it should have affirmatively been shown, that there was neither "suitable jail" or "suitable penitentiary." Indeed, as to these relators, the circular letter was foreign or *brutum fulmen*, because the law cited fixed absolutely their place of confinement in a State jail, from the moment the judge found that there was no penitentiary, and left them untouched and unincluded by a designation applicable only to persons then "convicted" of penitentiary offences, viz:

on April 1, 1876. The commitment to a wrong place and to the custody of a person not intended by law, as the jailors of these prisoners, is a serious and fatal defect, because it matters not how guilty the prisoners may be in fact, the rights flowing from an illegal imprisonment in the wrong place entitle them to be released from further restraint. Thus, Justice Lewis, in Beale vs. Commonwealth, when the Chief Justice remarked: "That it was monstrous that a prisoner whose guilt is established by a regular verdict, should escape punishment altogether, because the court committed an error in passing sentence," said: "It would, we think, be a startling novelty to the great Judges of England to be told that it is monstrous and intolerable that a party shall escape punishment who has been duly convicted of crime, but upon whom sentence has been imposed, *which the law did not authorize.*"

From the many cases wherein they have made decisions that have led to that result, we think they have regarded such escapes as less fraught with evil consequences than for the Courts to attempt to usurp authority in order to inflict or secure the infliction of unlawful punishments. See case of McDonald, lately decided in Maryland S. C. The English judges also remembered that Junius said, "the Constitution might be stabbed even through the ribs of a villain." The guiltiest man is entitled to be tried and punished "according to law." Under the law of Louisiana, C. P., Art. 822, it is laid down as a corrollary of the great writ of habeas corpus, that it will lie "where the order is in due form, but has been rendered

or *executed* by a person not authorized *for that purpose*, or *where the person detaining the prisoner is not the person to whom the law* has *prescribed that duty*." This principle is as sacramental in the law of habeas corpus to be administered in this Court, as though it were embodied in so many words in the statutes of the United States. If Col. Bridges, the defendant, cannot show that he is the person authorized by law for that purpose, or is the person to whom the law of his State and Congress prescribed that duty, his further detention of the prisoners is clearly unlawful, and an action for false imprisonment would lie. How does he show his authority? He says "the Board of Public Works, whose superintendent I am, has made a contract with the Attorney General to receive federal prisoners from other States, and you cannot question the validity of that contract, and I rely for their detention on Judge Woods commitment to my penitentiary." Our answer is, we care not to attack the validity of your contract with the Attorney General, but how does it show your authority to detain us in the penitentiary of West Virginia? You are the creature of a statute which only empowers you to receive your own State prisoners, and in which the Board of Public Works are utterly without power to exceed their mandate. The State Legislature has passed no statute authorizing you to contract for, or receive any federal prisoners, and this was the only mode prescribed by Congress for expressing the consent which your Board of Public Works have attempted to supply. Until such a statute is passed, the State is con-

sidered as not consenting, but as objecting to the use of her jails and penitentiary for that purpose. This consent could not be presumed even if the Governor and every individual in the State had consented separately. There is but one way to give this consent and no other is deemed official. Neither has Congress authorized the Attorney General to contract with subordinate officials to receive federal prisoners in a State whose Legislature is silent, or has never expressed its will by a statute. It gave him the power to designate only in a State whose Legislature had consented to receive federal prisoners, and no power to invade a State with federal prisoners, by adoption or erection, or creation of a penitentiary on her soil against her consent, under a private contract with unauthorized subordinate officials. Until the superintendent can show that this contract is binding on the State, or is ratified by her Legislature, he has exhibited and possesses no lawful authority for our incarceration in Moundsville. But it is urged by the Chief Justice that relators being actually confined in the penitentiary, and neither the State nor its officers objecting, we are without right or interest to test the authority under which we are imprisoned there.

This doctrine seems to strike down all the principles of law and justice, which lie at the foundation of the great writ, we have invoked. Who but the relators have a substantial interest to raise the question? So far as the State is concerned, she is officially ignorant of having consented to the imprisonment, and therefore cannot be

expected to object. The absence of consent by a statute is her objection. The Board of Public Works, who made the contract, believe it to be valid, although usurping the function of the Legislature in giving its consent, and are profiting by their labor, while the Attorney General has violated the law under which he acted, in designating a penitentiary in a State out of the category of those which the statute authorized him to designate. He had, in fact, attempted to adopt, create or erect a penitentiary in a State which had never opened its prisons "for that purpose," and made, as the Chief Justice says, "the penitentiary at Moundsville a penitentiary of the United States, and the State officers having charge of it their agents to enforce the sentences of imprisonment by the courts." To this conclusion of the Chief Justice we reply, that it would be sound, to a certain extent, if the Legislature had ever consented by resolution or statute, to the reception of prisoners of the United States, but even then it would remain a State penitentiary, and its officers be still the agents of the State, and only amenable to State laws; and in no sense would they be the agents of the Federal Government, but only "*contractors.*" This is the reason why the States were requested to pass the provision as found in the Louisiana statutes, making the officers guilty of misfeasance as to these prisoners, liable to the same penalties as if they were State prisoners. Thus, if Col. Bridges were to allow relators to walk out of prison, or to receive a bribe for their release, there is no law of Congress or West Virginia to punish him, and he is not re-

sponsible to the United States or the State for their safe keeping. This is indisputable. Moreover, what vitality is there in this contract, when it can be annulled by the parties contracting. Congress never contemplated such a precarious tenure for its prisoners, but relied upon a solemn act of the Legislature to hold them, and the necessity of repeal by the same power to end it, and in such a contingency, and others it had provided that the Attorney General might designate some other consenting State. The Chief Justice adds: "So long as the *State permits* him to remain in her prison, as the prisoner of the United States, and does not object to his detention by her officers, he is rightfully detained in custody under a sentence lawfully passed." To this we say, that if our view of the law and the attitude of the State of Virginia in keeping her prisons closed, by failure to pass the usual statute of reception, be correct, it is impossible to say that the "*State permits*" any thing. The State has no knowledge of the violation of her prerogative of consent not given in the only form clearly exacted by the act of Congress. Her Legislature has never met since relator's incarceration, and she is not presumed to be informed of such a violation of law.

If the *State* had ever *permitted* their reception, it would be an end to our application on this point. We are unable to discover or appreciate how far the liberty of relator held by federal authority can be remitted to the "*objection*" by a *State*, so as to prevent an examination of the courts of the country into its legality under the great

writ of habeas corpus. We think this Honorable Court will decide otherwise; and if the contract under which relators are held is illegal and unauthorized, it has the power and will not hesitate to declare it null and void. Waiving the views above expressed, that the Judge had, under his finding, no alternative but to send the prisoners to a State jail, and conceding, for argument merely, that he had the right to sentence them to the Moundsville penitentiary, then we submit, in conclusion, on this point, that to make the imprisonment lawful in West Virginia, there was another essential, viz: an act of the Legislature of that State, permitting the use of its penitentiary for that purpose, and until this is shown affirmatively, the imprisonment is unlawful, the writ should be granted and the prisoners released. Relator has shown, negatively, that there is no such act by the exhibits annexed to his petition.

Upon the second point: The sections of the Revised Statutes, 5541, 5546, confer no power of deciding the question of a "suitable penitentiary" on the Judge. This power is, however, conferred on the Attorney General, with certain limitations and conditions precedent, and was granted, we contend, to apply to prisoners, convicted in a State which had no suitable jails or penitentiary, or which, if they had them, had passed no statute of reception. In the case at bar, the Attorney General, on April 1st, 1876, two months before the relators were sentenced, had designated the penitentiary at Moundsville for persons "convicted" of crimes in the Circuit

Court of Louisiana. It does not say a word about there being no suitable jails or suitable penitentiary in Louisiana, and unavailable for that purpose, and was innocuous until both those facts had been found by the Court. He uses only the past participle, "persons convicted," and not hereafter "to be convicted," as stated by the Judge in his sentence. The Chief Justice thinks the Attorney General intended to act in reference to future convictions, and that his intentions, unexpressed, were sufficient; but, we submit, that in criminal matters, what he intended is not binding, and cannot apply to relators, who were convicted and sentenced long afterwards. We agree with the Chief Justice that such a circular letter "was all that was necessary to effect a removal after sentence passed, and that no action of the Court was required," and, therefore, the Judge should not have been "influenced by it in the future," but should have pursued the statutes which mapped out his duty, and left the circular to be acted on by the marshal, in case there was no suitable State jail or penitentiary in Louisiana, as to persons covered by its terms. The learned Chief Justice says further: "The order of the Attorney General is equivalent to a finding by him that the penitentiary of the State was unsuitable or unavailable for the confinement of criminals convicted under the laws of the United States, and when this action of the Attorney General is supplemented by a finding of the same fact by the Court, it seems to me to be as much within the power of the Court to order the imprisonment at Moundsville, as it

would have been if there had been no penitentiary in Louisiana." Without minutely dissecting this reasoning, it seems a sufficient refutation of its effect to inquire whether even, then, the commitment would have been any the less defective than it is now, if our position be correct that it required a statute of West Virginia to authorize its execution there? The Attorney General's selection of a penitentiary was utterly innocuous, unless the Judge had found there was no State jail, as well as no penitentiary, suitable or available in Louisiana, and should have been disregarded. The validity of the designation depended upon whether West Virginia had ever passed a statute authorizing the reception of federal prisoners. The learned Judge says, on this point, "that the policy of the law is to avoid circuity of action, and to permit the courts to do directly, as far as possible, all that they may do indirectly." This proposition seems questionable. It certainly would not authorize a Judge to hang a murderer convicted before him, because he could indirectly order the sheriff to do so. He could not collect a judgment rendered by himself and make a seizure, although he could issue an execution to the sheriff to do so. Why should a court have the power to send a convict out of the State, simply because after sentence the Marshal or the Attorney General could do so?

As we construe the power given, it was to designate a suitable jail, when imprisonment merely was the punishment prescribed, and a suitable penitentiary when imprisonment *at hard labor* was inflicted, and there were

no suitable jails or penitentiary in the State where the conviction was had, in which to execute the sentence. We think we have clearly shown under Sec. 5541 that the sentence should have been to a State jail, particularly when the Court found there was no penitentiary. and our argument for relator's release is well maintained by the concession of the Chief Justice, when he says: "If the sentence of the Court had been imprisonment in a jail, and the jails of the State of Louisiana had been found unavailable or unsuitable, a designation of some jail outside of Louisiana might have been necessary before the Court could have ordered a confinement outside of the State." We say the sentence to the Moundsville penitentiary was, on its face illegal, and in violation of the Section 5541, and that the Judge was bound to send them to a State jail, according to the finding in the sentence, and therefore the superintendent at Moundsville has no lawful authority for their detention The designation, *quoad* relators did not apply or validate their incarceration, and Superintendent Bridges is not the person to whom the law has prescribed the duty of their imprisonment.

We have incidentally discussed the third and fourth points, which are fully stated, and need no further comment than this.

We cannot concur for two reasons with the Chief Justice as to the validity of a designation by the Attorney General previous to the relator's conviction. In the first place, the statute distinctly enacts that the Attorney

General, to designate "*where, at the time of conviction,*" there may be no "penitentiary or jail," and that the suitable penitentiary or jail is then "to be designated," (it does not say "which has been designated,") and the prisoner is to be transported and delivered to the warden or keeper, etc., *by the marshal, etc.*. In the case at bar the formalities have not been pursued; but the judge sentences him directly to the penitentiary in West Virginia, as though the warden were his marshal and bound to obey his mandate, without any finding, either of a contract or an act of the State Legislature, permitting their reception, and he sustains his selection by embodying the designation of the Attorney General made two months before relator's conviction.

In the second place, the designation, if deemed to be tantamount to a finding by the Attorney General, that there was no suitable penitentiary and no suitable jail in Louisiana on 1st of April, 1876, does not exclude the possibility of their being suitable jails and suitable penitentiary on the 2d June, 1876. Would this finding stand for all time, or only be good for the date at which he so determined? Is it not essentially under the statute to be considered merely a temporary conclusion of the Attorney General, and not applicable to all time thereafter? Might not Louisiana have just finished on the 1st June a suitable jail or penitentiary? But it may be replied that on the 1st June the Judge so found, and his finding supplies the one required by the statute, and he could exercise the power specially conferred on the

Attorney General, and required no further designation. To this we reply :

That the Judge has no authority to determine this fact. Whether suitable or not, is an executive power and beyond his jurisdiction ; the law prescribes, that if the State penitentiary or jails be opened by statute, he must imprison them there and not look into the question of transportation to a distant State penitentiary, and whether considered a "proviso" or not to previous sections, it conferred no power upon him to determine this question ; it ought not to be interpreted so as to repeal the express and unambiguous will of Congress, found in section 5541, and enable a judge to inflict or secure infliction of punishment in a distant State, by findings untrue in point of fact, and directly violative of the law he is bound to obey. To authorize a court to disregard a fixed and constitutional rule of action, by adopting an exception, surrounded by conditions precedent, and remitted to an executive officer of the government by the statute, he, and those holding a prisoner under his commitment, must show a strict compliance with the law in terms and spirit, else it must be null and void. To say that the party so restrained of his liberty is without power or interest to question the right, is to reproduce the repulsive doctrine of the "man in the stocks," as to the efficacy of the Constitution, in obtaining relief.

In conclusion, we contend that, in the interpretation of criminal statutes, they are subjected to rigid rules, and that punishments thereunder are always "*stricti juris.*"

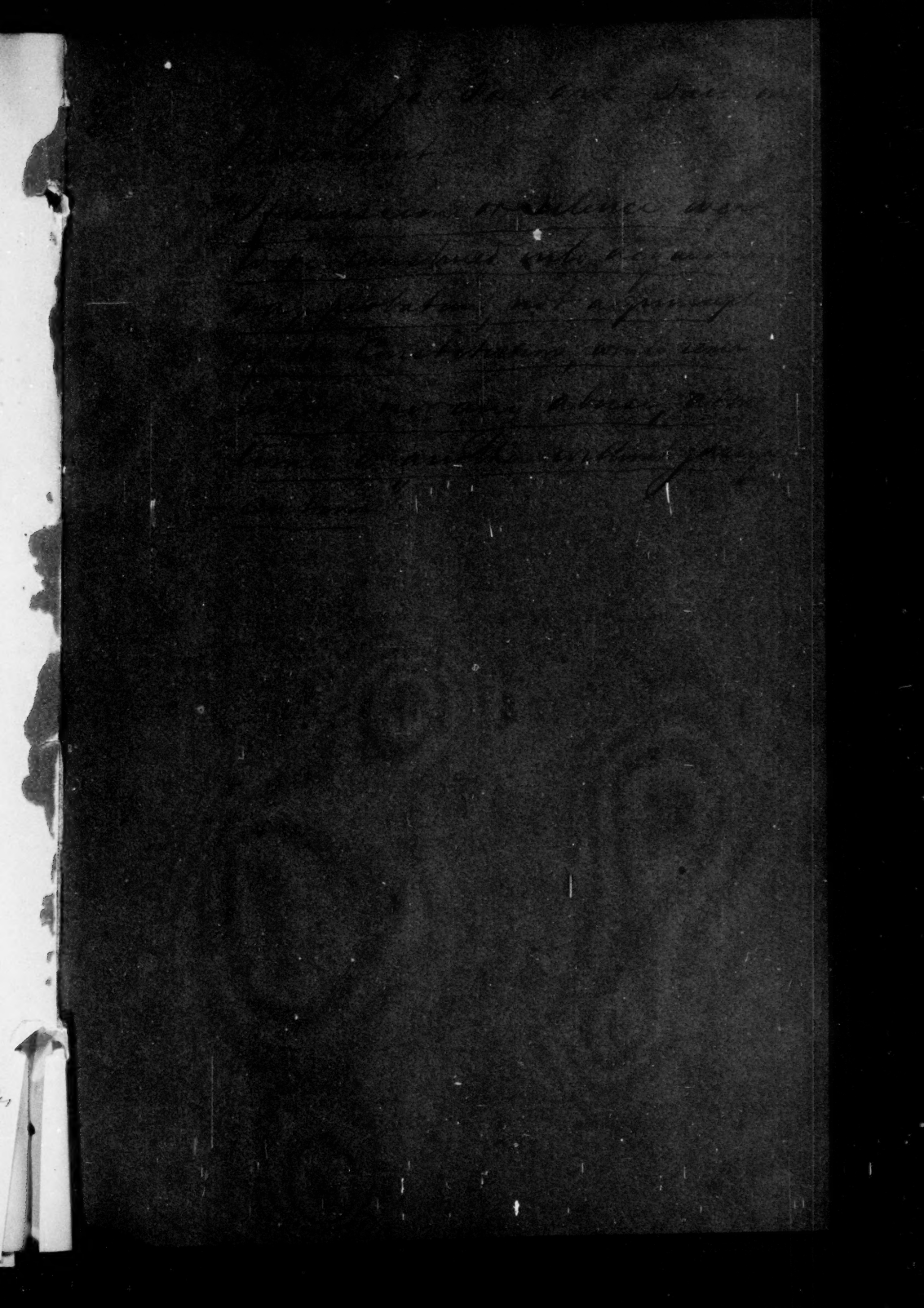
Thus, a great writer and commentator says, if a criminal law commands that a party found guilty under it shall lose his left hand, and the prisoner brought up for sentence has no left hand he must go free, for there is no law or authority to punish him by striking off his right hand; and the judge has no power to alter or change the law." So in the case at bar, if the prisoners were only liable to imprisonment in a State jail by the statute, in the absence of a suitable penitentiary, as we think is indisputable, it is cruel, unnecessary and unauthorized to sentence them to a penitentiary, or allow an executive officer to determine to send them to a distant penitentiary where they are subject to *penal servitude and civil death, and the disruption of the marriage tie*, and made infamous by law and public opinion. Besides which it superadds penalties and involves punishments not mentioned in the statute which they have offended, and indirectly subjects them to infamous imprisonment at hard labor, when the lawful penalty is merely imprisonment, and the offence considered trivial in comparison with the higher crimes for which punishment at hard labor is inflicted.

We respectfully ask that the prayer of relators' petition be granted.

Respectfully submitted,

DAVID C. LABATT.

In 12 Moakes Eng R. p 185 Queen vs Mount some similar points were raised & fully discussed & although the Case went off on the Colonial law, it seems to support our interpretation of analogous Statutes of designation in each particular Case after sentence.



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We respectfully ask that the prayer of relators' petition be granted.

Respectfully submitted,

DAVID C. LABATT.

Mr Chs Fox once said in Parliament

"If omission or silence were to be construed into acquiescence & approbation, not a principle of the Constitution, would remain entire, nor any abuse, at one time or another without justification"

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

IN THE MATTER OF O. H. KARSTENDIECK AND JOHN HENDERSON.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

IN THE MATTER OF O. H. KARSTENDIECK AND JOHN HENDERSON.

BRIEF FOR THE UNITED STATES.

The petitioners are in custody of the superintendent of the penitentiary of West Virginia at Moundsville, by virtue of a sentence of the United States circuit court for Louisiana, and an accompanying order of the Attorney-General of the United States.

In April last they were convicted of conspiracy (*Whisky ring*) under section 5440 of the revisal, and having each been sentenced to imprisonment for more than one year, were transferred, under an order of the Attorney-General of the United States, previously filed in court, to the penitentiary of the State of West Virginia at Moundsville.

I submit that such detention is justified by the provisions of sections 5541 and 5546 of the revisal, which (1) authorize courts to imprison, either in a State jail *or penitentiary* within the District or State, any person sentenced to imprisonment for a period of more than one year, and then (2) direct that where there is no such jail or penitentiary suitable or available, "such persons

shall be confined in some suitable jail or penitentiary in a convenient State or Territory to be designated by the Attorney-General."

It is a universal principle governing all collateral impeachment of the action of tribunals having jurisdiction over the subject-matter, whether judicial, legislative, or executive, that any preceding acts necessary to give their action legal validity have, by legal presumption, been duly performed. (United States *v.* Arredondo, 6 Peters, 729, &c. De Lassus *v.* United States, 9 Peters, 134.)

For instance, here it will be conclusively presumed that the court in Louisiana intended to inflict upon the petitioners imprisonment in a *penitentiary*, not in a jail; and also that the court and the Attorney-General—either or both, as may be necessary—continued, if that were necessary, "at the time of conviction" of the prisoners, to be of the opinion expressed previously in the order of the Attorney-General, that there was then no *suitable* or *available* penitentiary in Louisiana.

In short, if, under any possible showing to the circuit court and the Attorney-General, their joint action in confining the petitioners in the penitentiary of West Virginia could have been authorized by law, it will be presumed that such showing was made. The present proceeding cannot be turned into a writ to redress mere *errors* exhibited by the record.

The only question here is, supposing all that could have been done by the court and the Attorney-General, acting separately or jointly, to justify the detention complained of has actually been done, are the petitioners entitled to their liberty?

Assuming, then, that there was in Louisiana at the time of the conviction of the petitioners no penitentiary

suitable or available for their detention, and that the court considered that they ought to be sent to some *penitentiary*, was West Virginia a *convenient* State, and Moundsville a *suitable* penitentiary within the meaning of section 5446?

Here I may be permitted to deny that this section allows the Attorney-General to *transfer* prisoners whom the court has sentenced to detention in a penitentiary, *only* in the absence of a suitable *jail* as well as penitentiary within the State in which the court sits. I read that section as meaning that if there be no suitable *home* penitentiary, the prisoners may be sent to some suitable penitentiary *abroad*, and so where there is no suitable *home* jail, then to some jail *abroad;* and not that where there is no suitable home penitentiary then recourse is to be had to a *home* jail, before sending the prisoner to a penitentiary abroad, any more than that if the court intended to put them in jail, it would, for want of a home jail, have to send them to a *home* penitentiary, before looking for a jail abroad.

Again, whether West Virginia, being a State, were *convenient*, and whether Moundsville, being a penitentiary, were *suitable*, are, ordinarily, *executive* questions, to be settled by the Attorney-General alone, and, when so settled, are not susceptible of judicial review.

The learned counsel for the petitioners makes a question whether the use of the Moundsville penitentiary has been *allowed by the legislature of West Virginia.* To this it seems a sufficient answer that section 5546 does not require such allowance, although, in other connections, other sections may. The statutes of West Virginia expressly allow the United States to use the jails of counties and corporations for the confinement of their

prisoners. (Code of 1868, p. 258, sect. 40.) Nothing is said in this connection as to the penitentiary, but reckoning apparently upon *comity*, the section in question does not require legislative sanction, and the officers of the State, acting under an opinion of its attorney-general, hold (see Record, Exhibit Q) that such legislation is not necessary.

In the meanwhile, section 5539 furnishes the law under which prisoners received into such institutions, whether under express legislative allowance or otherwise, shall be treated and held. They are not held under a mere *contract*, as suggested for the petitioners.

S. F. PHILLIPS,
Solicitor-General.

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SUPREME COURT OF THE UNITED STATES.

No. 138.

PETER LYMAN, APPELLANT,

vs.

THE STEAMBOAT JOHN L. HASBROUCK, ROBERT D. CORNELL ET AL., CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the district court of the United States of America for the eastern district of New York, do hereby certify
2 that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 7th day of March, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the said United States the ninety-fifth.

SAMUEL T. JONES, *Clerk.*

At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 7th day of December, in the year of our Lord one thousand eight hundred and sixty-nine.

Present, the Hon. Charles L. Benedict, district judge.

PETER LYNAN
vs.
THE STEAMBOAT JOHN L. HASBROUCK, HER tackle, etc.

The libellant in the above cause appears and files his libel against the above-named vessel in the words and figures following, to wit:

3 To the honorable Charles L. Benedict, judge of the district court of the United States of America for the eastern district of New York:

The libel and complaint of Peter Lynan, owner of the sloop or vessel called the Venus, he tackle, apparel, and furniture, against the steamboat or vessel John L. Hasbrouck, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest in said steamboat, in a cause of collision, civil and maritime, and thereupon the libellant alleges and articulately propounds as follows:

That the said steamboat John L. Hasbrouck, her tackle, apparel, and furniture, are now in this district.

That at the times hereinafter mentioned the said sloop Venus, her tackle and furniture, was owned by the libellant, and under the command of Edward O'Brien, master, and was tight, staunch, and well and sufficiently manned, tackle', and provided.

That on the 26th day of November, 1869, said sloop Venus had taken on board a cargo of stone at Catskill, on the Hudson River, and on said day left said place bound for the city of New York.

That at about midnight on the 27th day of November, 1869, said sloop Venus was off West Point, sailing on the starboard tack, east-southeast, and her lights properly set and burning brightly, and was in about the middle of the river. That at such time the wind was southwest, very light, and the tide was running a strong ebb.

That at said time the lookouts on said sloop discovered the said steamer John L. Hasbrouck about half a mile down the river, sailing northerly.

4 That said steamboat approached the said sloop to within about

fifty feet, and on a line with the sloop's rigging. That the master of said sloop hailed the said steamboat, and told it to pass to the sloop's stern; that said steamboat, on being hailed, sheered off and passed directly across the bow of the said sloop.

That the bowsprit of said sloop struck the said steamer on her port side, about twenty feet aft her bow, and under the guard. That the guards of the steamer catching on the bowsprit as aforesaid sunk the said sloop, whereby the said sloop, her cargo and freight, of the value of seven thousand dollars, were wholly lost, and libellant greatly damaged.

That from the discovery of said steamboat till the collision aforesaid the said sloop kept her course.

That the said collision was caused solely by the persons navigating said steamboat, among other things, in crossing the bow of the said sloop.

That payment of said damages has been demanded from the said steamboat John L. Hasbrouck, but that no part thereof has been paid, to the great damage of the libellant.

That all and singular the premises are true, and within the maritime and admiralty jurisdiction of this honorable court.

Wherefore libellant prays that process in due form of law may issue against the said steamboat John L. Hasbrouck, her tackle, apparel, and furniture, and that all persons having or pretending to have an interest therein may be cited to appear and answer all and singular the matters propounded, and that this honorable court would be pleased to pronounce for the damages aforesaid, and for such other and different relief
5 in the premises as shall to law and justice appertain, and also to condemn said steamboat John L. Hasbrouck, her tackle, etc., and the party intervening for his interest therein, in costs.

A. M'CUE,
Proctor for Libellant, Peter Lynan.

Sworn before me December 7th, 1869.

SAMUEL T. JONES,
U. S. Comm'r.

(Endorsed:) U. S. district court, eastern district of N. Y. Peter Lynan, libellant, against The Steamboat John L. Hasbrouck. Libel. A. McCue, proctor for libellant, 357 Fulton street. Filed December 7th, 1869.

6 District court of the United States for the eastern district of New York.

Stipulation for libellant's costs, entered into pursuant to the rules and practice of this court. Filed the 7th day of December, 1869.

Whereas a libel was filed in this court on the 7th day of December, in the year of our Lord one thousand eight hundred and sixty-nine, by Peter Lynan, against the steamboat John L. Hasbrouck, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said vessel may be condemned, &c.; and the said libellant and Edgar M. Cullen, surety, parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellant or his surety, execution may issue against goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of

whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against him by this court, or, in case of appeal, by the appellate court.

PETER LYNAN.
EDGAR M. CULLEN.

Taken and acknowledged this 7th day of Dec., 1869, before me.
SAMUEL T. JONES,
U. S. Commissioner.

7 EASTERN DISTRICT OF NEW YORK, *ss:*

Edgar M. Cullen, party to the above stipulation, being duly sworn, doth depose and say, that he resides in the city of Brooklyn, and that he is worth the sum of $500, over and above all his just debts and liabilities.

EDGAR M. CULLEN.

Sworn to this 7th day of December, 1869, before me.
SAMUEL T. JONES,
U. S. Commissioner.

Recorded the 7th day of December, 1869.
SAMUEL T. JONES,
Clerk.

EASTERN DISTRICT OF NEW YORK, *ss:*

The President of the United States to the marshal of the eastern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the eastern district of New York, on the 7th day of December, in the year of our Lord one thousand eight hundred and sixty-nine, by Peter Lynan vs. The Steamboat John L. Hasbrouck, her tackle, &c., in a cause of collision, &c., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamboat or vessel, her tackle, &c.,
8 may be cited, in general and special, to answer the premises, and, all proceedings being had, that the said steamboat or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

You are, therefore, hereby commanded to attach the said steamboat or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of said libel, that they be and appear before the said court, to be held in and for the eastern district of New York on the 22d day of December, 1869, at twelve o'clock, noon, of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the honorable Charles L. Benedict, judge of the said court,

at the city of Brooklyn, in the eastern district of New York, this 7th day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the ninety-fourth.

SAMUEL T. JONES, *Clerk.*

A. McCUE,
Proctor for Libelant.

9 (Endorsed:) Eastern district of New York, United States district court. Peter Lynan vs. the S. B. John S. Hasbrouck, her tackle, &c. Monition returnable Dec. 22d, 1869. A. McCue, proctor for libellant.

I hereby waive execution of the within process and consent to bonding vessel, as if attached.
Dated Dec. 22d, 1869.

W. JAY HASKETT.

At a stated term of the district court of the United States of America, for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 9th day of December, in the year of our Lord one thousand eight hundred and sixty-nine:
Present, the Hon. Charles L. Benedict, district judge.

THE STEAMBOAT JOHN L. HASBROUCK
ads.
PETER LYNAN.

10 And now, Robert D. Cornell, one of the owners of the intervening for the interest of himself and Joseph C. Doughty, Augustus Doughty, and Isaac C. Wicks, in the said steamboat, appears before the honorable court and makes claim to the said steamboat, etc., as the same are ordered to be attached by the marshal, under process of this court at the instance of Peter Lynan; and the said Robert D. Cornell avers that the persons above named were in possession of the said steamboat at the time of the process issued for attachment thereof, and that the persons above named are the true and bona-fide owners of the said steamboat, and that no other person is the owner thereof; wherefore they pray to defend accordingly and waive execution of process against the steamboat.

ROBERT D. CORNELL.

Sworn to and subscribed this 9th day of December, A. D. 1869, before me.

SAMUEL T. JONES,
U. S. Commissioner.

WM. JAY HASKETT,
Proctor for Claimant.

(Endorsed:) U. S. district court, eastern district of N. Y. Peter Lynan vs. the steamboat John L. Hasbrouck, &c. Wm. Jay Haskett, proctor for claimant. Filed the 9th day of December, 1869.

11 District court of the United States for the eastern district of New York.

Stipulation entered into pursuant to the rules and practice of this court.—Filed the 9th day of December, 1869.

Whereas a libel was filed in this court, on the 7th day of December, in the year of our Lord one thousand eight hundred and sixty-nine, by

Peter Lynan, against the steamboat John L. Hasbrouck, etc., for the reasons and causes in the said libel mentioned, and praying that said steamboat may be condemned, etc., and the parties hereto hereby consenting that, in case of default or contumacy on the part of the claimants or their surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands;

And whereas also a claim has been filed in said cause by Robert D. Cornell, on behalf of himself and other owners:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon an appeal by the appellate court.

JOSEPH C. DOUGHTY.
AUGUSTUS DOUGHTY.
ISAAC C. WICKS.
ROBERT D. CORNELL.
JOHN L. WILLIAMS.
JOHN SMITH.

Taken and acknowledged this 9th day of December, 1869, before me; as to Smith, December 21st, 1869.

SAMUEL T. JONES,
U. S. Commissioner.

12 EASTERN DISTRICT OF NEW YORK, *ss:*

John L. Williams, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN L. WILLIAMS.
JOHN SMITH.

Sworn to this 9th day of December, 1869, before me, except as to Smith, and as to which, December 21st, 1869.

SAMUEL T. JONES,
U. S. Commissioner.

Recorded the 9th day of December, 1868.

SAMUEL T. JONES, *Clerk.*

District court of the United States for the eastern district of New York. In admiralty.

Stipulation for value, entered into pursuant to the rules and practice of this court.—Filed the 21st day of December, 1869.

Whereas a libel was filed on the 7th day of December, in the year of our Lord one thousand eight hundred and sixty nine, by Peter Lynan, against the steamboat John L. Hasbrouck, her tackle, &c., for the reasons and causes in the said libel mentioned; and whereas execution of the process herein has been waived by the proctor for libellant;

And whereas a claim to said steamboat has been filed by Rob-
13 ert D. Cornell, on behalf of himself and others, and the value of said vessel thereof has been fixed by consent at fourteen thousand ($14,000) dollars, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing that in

case of default or contumacy on the part of the claimant or John S. Williams, and John Smith, or their sureties, execution for the above agreed value, with interest thereon from this date, may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulator undersigned shall, at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree, to Wm. Jay Haskett, esquire, proctor for the claimant of said steamboat John L. Hasbrouck, abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

R. D. CORNELL,
AUGUSTUS LOUGHTY,
ISAAC C. WICKS,
Per R. D. C.
JOHN L. WILLIAMS.
JOSEPH C. DOUGHTY.
JOHN SMITH.

Taken and acknowledged this 9th day of Dec., 1869, before me; as to Smith, Dec. 21, 1869.

SAMUEL T. JONES,
U. S. Commissioner.

14 EASTERN DISTRICT OF NEW YORK, *ss:*

John L. Williams, No. 20 Vandam street, New York City, party to the above stipulation, being duly sworn, depose and say that he is worth the sum of fourteen thousand dollars, over and above all his just debt and liabilities.

JOHN L. WILLIAMS.
JOHN SMITH.

Sworn to this 9th day of December, 1869, before me; Smith sworn December 31, 1869.

SAMUEL T. JONES,
U. S. Commissioner.

Recorded this 21st day of December, 1869.
SAMUEL T. JONES, *Clerk.*

In admiralty.

To the Hon. Charles L. Benedict, judge of the U. S. district court for the eastern district of New York:

EASTERN DISTRICT OF NEW YORK, *ss:*

The answer of Joseph C. Doughty, Robert D. Cornell, Augustus Doughty, and Isaac C. Wicks, claimants of the steamboat J. L. Hasbrouck, and defendants herein to the libel of Peter Lynan, libellant, against the said steamboat, her tackle, etc., in a cause of collision, answering the said libel, aver:

First. They admit, as alleged in the 1st article of the said libel, that the said steamboat was in this district at the time of the filing of the said libel.

15 Second. These defendants, answering the 2d article of the said

libel, as to the allegations of the ownership of the said sloop, and by whom she was commanded, not having any knowledge of the same except as stated in said libel, leave the libellant to the proof thereof; and as to the allegation of the condition of the said sloop, and that she was sufficiently manned, tackled, and provided, these defendants aver upon information and belief that at the time of the said collision, the said sloop was old and rotten, and was not properly manned, tackled, and provided, and was not in a navigable and manageable condition.

Third. Answering the allegtions in the 3d article of the said libel, as to her departure from Catskill at the time set forth, or as to her cargo, these defendants leave the libellants to the proof thereof.

Fourth. And these defendants, answering that portion of the libel in the 4th, 5th, and 6th articles thereof, which narrates the said collision, aver that the same is not accurately or truly set forth, but aver the facts to be, that on the 27th day of November, 1869, the said steamer was standing on her regular course, heading about N. N. E. ¼ E., on the east shore of the Hudson River, and about abreast of the land through which the tunnel of the Hudson River Railroad runs, just above Garrison's, and was about 50 yards from the shore, that course being the usual and proper course of navigation for steamers bound up against the strong ebb-tide which was then running, when a sloop was discovered, under sail, coming down the river, and she was then about abreast of West Point, and to the westward and northward of the light, and at the
16 time she was heading about southeast and exhibited her starboard light, and then when she got around the point she exhibited a glimpse of her port light, and immediately shut it out again, and the pilot of the steamer then gave slight sheer to the eastward to give the sloop a clear way in the channel, and then finding that the sloop was hauling more to the eastward, and continuing her course directly across the river towards, and right for the steamer, the said pilot blew the whistle, and then stopped the engine, and the sloop continued her course and struck the steamer as she lay over on the east shore about abreast of the draw on the railroad between the tunnel and the mainland, and 200 feet therefrom, motionless, in the water, with bowsprit, and drove the same almost at right angles through the steamer's port-side, about 40 feet aft her bow, thereby making a hole through the sound and solid plank, timbers, and skin of the steamer, as clear as though made by a cannon-ball, and then fell with her port-side against the port-side of the steamer, broke off her bowsprit, and then sunk in a few minutes.

And these defendants admit that the tide was strong ebb, but deny that the wind was southwest and light at the time, but aver that the wind was about N.W. and was blowing a good stiff breeze.

And these defendants deny the allegation of the 8th article of said libel that the said sloop Venus kept her course as by the libellant alleged, but aver that she continually altered her course from the time she was discovered, from three-quarters to a mile off, until she struck the said steamer, and during said time kept heading more and more to the
17 eastward, and when she struck the steamer, she, the said sloop, was heading about E. S. E. ½ east, and that the said steamer, perceiving the irregularity of the sloop's movements, had stopped her engine, and was about to reverse at the time, but was unable to determine what to do by said sloop's uncertain navigation.

And these defendants deny, as alleged in a portion of the 7th article of said libel, that the said sloop and cargo were worth the sum of seven thousand dollars, and leave the libellant to the proof of the same, and also of the allegation of the total loss thereof.

And these defendants deny, as alleged in the 9th article of said libel, that the said collision was caused by the crossing of the bow of the said sloop by the said steamer; but aver that the said collision was caused by the want of nautical skill in the persons navigating the said sloop in these respects, viz, that they did not have her sails properly and fully hoisted, and that her jib was fouled, and that all her crew were engaged in making sail, with no look-out, and that by reason of the same, the said sloop could not luff, although every effort was made by her captain, as these defendants were informed by the said captain, putting her helm hard down for ten minutes before the collision, and that she thereby became and was wholly unmanageable at the time she struck the steamer.

And these defendants admit, as alleged in 10th article of said libel, that the libellant demanded payment of his demand against the said steamer, and that the defendants refuse to pay the same, and aver that they claim damages of the said libellant for the injuries done the steamer.

18 And these defendants deny, as alleged in the 11th article of said libel, that the premises of said libel are true, and within the jurisdiction of this hon. court.

R. D. CORNELL.

Sworn to before me this 4th day of January, 1870.

JOHN H. SCHOLL,
Notary Public, City and Co. N. Y.

(Endorsed:) In admiralty. United States district court, for the eastern district of New York. Peter Lynan vs. The steamboat J. L. Hasbrouck, Doughty, Cornell, et al., claimants. Answer. Wm. Jay Haskett, proctor for cl't, 15 Centre st., N. Y. Filed 5th day of January, 1870.

19 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms in the city of Brooklyn, on the 23rd day of June, in the year of our Lord one thousand eight hundred and seventy—

Present, the Hon. Charles L. Benedict, district judge.

PETER LYNAN
vs.
THE STEAMBOAT JOHN L. HASBROUCK, HER tackle, etc.

Cause called. Both sides ready. Hearing ordered. Messrs. Cullen & Donohue appear for libellants. Messrs. Haskett & Benedict appear for respondents.

Pleadings read.

Evidence for libellants:

William Goldsmith sworn and examined.
Edward O'Brien " " "
Mathias Turner " " "
Isaac Benton " " "
John L. Johnson " " "
Joseph Dolahan " " "
Libellants rest.

Evidence for respondents:

Abraham Clough sworn and examined.
James Dow " " "
Hearing suspended and court adjourned to June 24th, 1870, at 12 m.

20 JUNE 24TH, 1870.—Hearing resumed.

Evidence for respondent:

Frederick Herman sworn and examined.
Robert Bullis " " "
Martin Decker " " "
Hearing suspended until 12 m., on June 27th, 1870.

JUNE 28TH, 1870.—Hearing resumed.

Evidence for claimant:

Peter Hill sworn and examined.
John Hopton " " "
Frederick Bell " " "
Casper Clough " " "
Abraham Crapser " " "
Henry Squire " " "
Isaac C. Wicke " " "
Robert D. Cornell affirmed "
Rest.

Evidence for libellants:

Mathias Turner recalled and examined.
John A. Pease sworn " "
Isaac Benton recalled.
Hearing suspended until June 29th, 1870.

JUNE 29TH, 1870.—Hearing resumed.

Evidence for libellants:

John Muller sworn and examined.
Justin Austin sworn and examined.
Testimony closed.
Cause submitted on briefs to be furnished.

21 U. S. district court.

PETER LYNAN
vs.
THE STEAMBOAT JOHN L. HASBROUCK. } June 23d, 1870.

Testimony on trial.

WILLIAM GOLDSMITH, being duly sworn and examined, says: I was boating in the North River. I didn't see this collision. I saw a spar sticking up the other day about in the spot where I heard the Venus was sunk. I think the spar was a little near the east shore. I was within 100 yards from the middle of the river, 100 yards to east of the river; the channel there I consider to be 500 yards; I never measured it. It is a good boating channel, plenty of room.

Cross-examined:

This was a week ago yesterday that I saw the spar.

EDWARD O'BRIEN being duly sworn, and says: I was captain of the sloop Venus; Peter Lynan owned her. I was on board at the collision. I had been on her three years at the time. There were four persons on her then, including myself. We were bound to Brooklyn from Catskill with flagging-stone, butter, and potatoes; we were pretty full, as
22 usual. After I came round West Point I first saw the lights of the Hasbrouck; she must then have been three-quarters of a mile off. I had green and red lights both set; the tide was ebb; the wind was very light, none to amount to anything; the vessel was drifting till after I got below the point. From the time after I saw her lights good to the collision, my course was not changed. To me the Hasbrouck appeared to make several changes; when I first saw her I couldn't tell which side she was going; she made several changes; the last change was to the eastward where she sunk me; the wind, if there was any at all, as near as I could get it, was W.S.W. or west; there wasn't any of it.

Cross-examined:

I went on board the Hasbrouck right after the collision; it was morning then, after 12 m. I never had any conversation with the pilot to know him. I asked for him; never saw him to know him. I don't know him yet. I recollect a man coming in with a lamp; this man here (named Clough) looks like the man.

Q. Didn't you say to this man here (Clough) at that time that there was room for you to go westward, but your sloop wouldn't luff?

A. I told him my vessel wouldn't luff. I don't recollect that I ever talked with this second man, (his name is Squires,) I have talked with so many.

Q. Didn't you, in conversation with Mr. Squires on that night, tell him that you couldn't make your vessel luff, or to that effect?

A. I don't know the man. I won't say I didn't tell him so. I don't recollect the man. I don't recollect having a conversation with the engineer. I can't recollect seeing him now that he is pointed out, I saw so many. In any conversation I have said the sloop wouldn't mind her helm.

23 Redirect:

I say that after I saw the Hasbrouck's lights I didn't alter my course. I didn't see the lights till I got round the point, and after seeing them didn't alter my course.

MATHIAS TURNER, being duly sworn and examined, says: I am watchman on the Hudson Railroad. I recollect this collision; it was Saturday night; it was about opposite what used to be the draw-bridge, a little below it—not much; I should think one-half a mile below the light-house on West Point.

Thought it was in the centre of the river, may be a little to eastward of middle. I heard nothing till the crash; that was the first I saw. I saw the sloop where she sank; that is a little east of the middle of the river. I go over the mile seven or eight times a day, and the mast of the sloop could be seen; the mast is not there now. There was very little wind; not enough to steer a vessel below the point; there was not much wind anywhere I was. It drawed in by my shanty as if it was from the S. W. My shanty stands a little in the hill behind the bluff.

Cross-examined:

I am both night and day watchman. I go 24 hours on and 24 off; I

come on at 6 a. m. and stay till next day at 6, some days more. It was Saturday night; I don't recollect the day of the month. I think it was in November last. I should suppose it was near midnight. I had no watch. The train goes up ten minutes before two, and by that I judge it was near midnight. I was at the shanty at the time of the collision.

24 The shanty is above the tunnel above Garrison's, and right opposite the boat-house on the creek. I was in the shanty when I heard the collision. I judge the river there, from shore to shore, is half a mile, flats and all, or nearly that. I think the channel is 500 yards wide there. The flats opposite where the collision was don't run out over six rods from the east shore; that is below the draw-bridge, and she was a little below the draw-bridge. I went out when I heard the crash, but I didn't see anything; I couldn't see anything at all—no boats of any kind when I went out—but I heard it. I have seen several collisions there, but this I didn't see; I heard it. I saw the mast raised out of the water, butt end up, a week ago last Friday. It was all under the water until that morning; that is the mast I spoke of; it came up of its own accord, butt end up, and stood about two feet out of the water. It was taken away by a raft a week ago yesterday. I saw a big schooner next morning after the collision lying there, just above where the accident happened. I don't know her name.

Cross examined:

This big schooner lay at anchor between the two bridges, which are eighty rods apart; she didn't lay quite half way. The collision was just below the lower bridge—a little below, not much—not over three rods below the centre of the lower bridge—the draw-bridge, a little south of it, but very little.

I only judge of the place of the collision by the noise. I could not tell very precisely. Boxes came ashore, and I knew it was about there. I judge the place by the noise I heard.

Redirect:

The mast came up as near as possible where I heard the noise.

25 ISAAC BURTON, being duly sworn and examined, says: I am boatman. I was on the Venus; was the first hand. I saw the lights of the boat that run into us. I was then forward; the captain was at the wheel. I think the steamboat was three-fourths to one-half a mile off when I first saw her lights. I looked at her till the collision. So far as I saw there was no change in the course of our vessel. There was not enough wind to tell how it was; we were drifting down with the tide.

Cross examined:

We got under-weigh for just above Newburg. After we left Newburg we had mainsail and jib. We took them in after we left Newburg, in the commencement of the Highlands, because it blew pretty hard there. We got them up again after we got around Magazine Point on the east shore. We didn't get sail up before we got down to West Point. We hove the sail up to the reef, and was making calculations after we got round the point to get all the sail on to her. We had the peak up good and straight. We had no trouble about the jib as I know of. I had swayed the jib up myself; it was up just about going round the point. Joseph was with me at the jib, swaying it up; the other man was aft—amidships; I can't tell where he was. I didn't stay forward quite until the collision. I got in the boat, not till after the collision. I started and went aft when the vessels were about 20 feet apart. I

just jumped on the quarter as they struck. All were in the boat. Before I did, I told the fellows to jump in the boat, because I saw her beginning to settle. I was on the Hasbrouck after the collision. I don't recollect a talk with the engineer, as I know of, nor with the pilot. I didn't
26 tell the pilot that we were all getting the main sheet, because I wasn't there; I was forward. I didn't tell him we were all forward trying to get sail up. Joe and I got up the jib, and I then stood there looking at the Hasbrouck. I didn't see her lights before I got the jib up. I first saw the three head-lights of the steamboat, two side lights, and bow light. I don't know as I saw much change in her lights, more than heading right up the river. I disremember whether I heard our captain say on the steamboat that our vessel wouldn't luff. I can't swear that I did or that I didn't, because I disremember.

As the steamboat got very close to us she headed to eastward. We were setting to eastward and headed to eastward. If she had kept her course I think she would have passed us to west.

Cross examined:

I saw her lights before I finished swaying up the jib; no one ordered me to sway up the jib; I reported the light to the captain; I had just about got the jib swayed up when I said that; no one touched the jib-sheet. When I saw her lights I saw her off our starboard bow; we were not then far enough around the point to see straight down, and the steamboat was therefore heading about to eastward of us. I spoke to Joseph, that if that fellow undertakes to go to eastward of us we will come together, because we have no wind, without she goes well to eastward. When I said that the steamboat was near Garrison's, quite up to us; it was some time after we had swayed up the jib; there was no wind to move the jib at all. I have followed the water about 15 years.

27 JOHN L. JOHNSON, being duly sworn and examined, says: I am cook; this was my first trip on a sailing-vessel; I was on the Venus at this collision; there was no wind at the collision.

Cross-examined:

I was on deck, aft, near the pump; I had been there some time. The mainsail was up all hoisted; the men were not working at the jib at the collision; I could see the captain at the helm; I didn't see the captain change the helm; I don't remember hearing the captain say that the sloop wouldn't obey her helm; the sloop was heading over to eastward shore; she wouldn't have gone ashore if she hadn't hit the steamboat.

JOSEPH DOLAHAN, being duly sworn and examined, says: I was on the Venus; I was forward when I first saw the light of the steamboat; she was then three-fourths of a mile off *then;* the jib was about swayed up then; we kept looking at the steamboat till the collision. There was no wind of any account; not enough to give us steerage-way; I should think the steamboat would have gone to westward of us, if she had kept the course she was on; she sheered to eastward when she drew pretty nigh on us.

I saw no change in the course of our vessel after I saw the steamboat.

Cross-examined:

I saw both side's lights and bow light; I saw no change in them; when I saw the lights they bore over our starboard bow; I stayed for-

ward till the collision. We were below the light-house when I saw the steamboat; the lights were below the point; I saw the steamboat
28 as quick as we opened round the point. The ebb-tide was running pretty strong there; I didn't see her over the port bow at any time.

I have followed the water ten months; have been five months and two weeks on this vessel; I had been up the river with her.

Libellant rests.

Testimony for claimants.

ABRAHAM CLOUGH, being duly sworn and examined, says: I am pilot on steamboats; I have followed the water about 16 years; I have been pilot of steamboats four years; I have always been on the Hudson River on sailing-vessels before I was pilot; I know this locality. I was second pilot of the Hasbrouck, and was on duty in the wheel-house; it was a cloudy night—broken clouds—not a very dark night, the wind N.W., blowing a good stout breeze. I saw some vessels bound down before we got up to West Point; I saw one about two miles or three below West Point, and another above the lower end of the race, both going down with sheet all off, with a good breeze of wind from N.W. We had the barge Ulster Co. in tow on the starboard side; we had no other vessels in tow. We were going up between seven and eight miles an hour by the land. As we came up to West Point we were along the east shore; I saw the lights of the sloop after we got above Garrison's one-eighth of a mile, I should think; I saw them north of West Point light, and to west of it as I looked across the
29 point, not over the point I saw her green light. I kept along up to eastward. After I set along up a ways I saw a red light. Shortly after they shut it in, and directly I saw the red light I gave them a whistle. I saw they kept bearing off to eastward, didn't alter their course, and I stopped. When the red light went out of sight they were one-quarter of a mile, say, from us—I couldn't tell exactly. When I saw the red light I hauled the steamboat more to eastward—worked her to eastward all I could. I made no other change of course. I think she was between 200 and 300 feet off when we stopped. We laid still till she came down foul of us. We were then between 400 and 500 feet from the railroad, I should think, when she came foul of us—that is, 150 or 200 feet from the edge of the channel; I can't tell exactly. I didn't think it safe for us to go any further to east. She struck us on the port side, about 43 feet from the stem. The vessels came together about at right angles; the bowsprit of the sloop shoved a hole through the side. The bowsprit went through a three-inch plank outside and a three-inch plank inside, and broke off a timber eight inches thick.

If she had kept the red light in sight she would have cleared us. I could see her sails when I saw the red light. I could see she changed her course. She hauled down, straight down the river; she luffed so that I could see the red light. I saw her bear away after that, so that she shut off the red light, so as to hide it from my sight. Our pilot-house is 42 feet or so from our stern.

After the collision the captain and hands of the sloop came on board the Hasbrouck. I had no conversation with them on the Hasbrouck. I did have next morning on the ferry-boat. The captain told me that he couldn't make his sloop luff.

(Objected to.)

30 He didn't say anything to me about his sails. I asked him if

there wasn't room for him to go to westward, and he said there was, but he couldn't make his vessel luff. The blow was little below the draw, a very little. I should think the sloop was coming between six and seven miles an hour; coming down very near as fast as we were going up. The tide was three miles, about the strength of the ebb-tide.

Cross-examined:

Our course there from Garrison's up is N. N. E. to the point by compass. The wind was N. W. The sloop had a boom on the port side; she didn't shift her boom. All I did was to port the wheel and ring the bell to stop, and that is all I did. The propeller turns from left to right going ahead. We were heavier than the barge, I think; the barge had but very little freight. At the collision we were headed on the flats a couple of lengths above the draw-bridge.

We had changed to east, ½ a point or a point to east. I didn't put helm over but a little; might have put it over a turn on the wheel and kept it there till the collision. It takes four and a half to five turns to put it hard over. I am not sure as to that. It takes three certainly, and I think more. The barge swung a little to the east when we stopped. We had eight deck-hands. The captain, Robert B. Cornell, was on board. I can't tell where he was; I didn't see him till after it happened. I told him how it happened. Frederick Homer was in the pilot-house, and had hold of the wheel. His business was watchman and lookout. It was his watch. He just stepped in there to give me a turn on the wheel. He might have been two or three minutes,
31 or five minutes. The first pilot was asleep in his room, and came out just after the blow. The mate was also in the room. I went on duty a little after six. I most always stay till we get to Newburg. I expected to call another man when we got to Newburgh. Herman went on duty when she left New York. His time is all night.

It was a good, tight, two-reefed breeze; between five and six knot breeze; it might have been more. When I first saw her she might have been one-eighth of a mile above Garrison's; three-fourths of a mile to the point. The channel there is over one-quarter of a mile. I saw the light past the light-house; the other side of the light-house from us; it just cleared the range of the light-house, off our port bow. The light stands a little way back from the point; the base of the light-house is 10 or 15 feet from the water. The rocks run out 40 or 50 feet from the light—slope down. The pilot-house is 25 or 30 feet above the water. The collision took place pretty much right off the light; I saw the sloop's light first; we might have run five minutes after I saw the green light before I saw any other; we ran about half the distance when we saw both lights. I saw the red light plain; she must have run her length showing the red light. I told Cornell I caught a glimpse of the red light, and so I say now. She was then a point over our port bow; I never lost sight of the green light up to seeing the red light; I made no change. I told him, Mr. Haskett, about the collision, and shortly after the occurrence; I won't swear that I didn't tell him that I made a sheer after they shut in the red light. I suppose I told Mr. Cornell the truth; I don't think I told him I sheered after we shut in the red light; I meant to tell him the truth. Shutting in of the red light showed me that the course
32 of the sloop was taking her to east; I think the sloop run about her length with the red light in view. I blew the whistle when the red light shut off. We then had a little sheer to eastward, and I couldn't break it; very hard to break it. The whistle was a signal to

her to port her helm—a request to her to port her helm. It might have been two minutes, or near that, before I slowed; I might have gone within one-eighth of a mile before I slowed. I suppose the sloop was 65 or 70 feet long; I slowed, and stopped all at once, as quick as I could pull the bells.

Redirect:

If we had backed, we would have slowed her more in the sloop's way; she backs to port. She was still. There was plenty of room for her to have gone to the west side if she had luffed. I blew to let her know we were going to eastward, for them to port helm if they thought fit; at the time the sloop bore on our port bow. After the blow I couldn't have sheered so as to go to westward of her; we had a barge on the starboard side, which makes it difficult to sheer to westward.

Recross:

If we had stopped and backed at the instant, the barge would, with headway, carry her to west. There was no one at the barge's wheel. We couldn't have sheered to westward after the whistle blew in time to clear the sloop; we never have any one at the barge's helm. I am sure we couldn't have sheered a point to westward after the whistle by any use of the helm. The usual course, with no vessel in the way in sight, and ebb-tide, we clear the rocks off the light at West Point one-half a length of the boat, keep right course till we open round Magazine Point; we keep straight course for a mile, perhaps more.

33 JAMES DOW, being duly sworn and examined, says: I am a ship-carpenter; I lived at Poughkeepsie since '35; I know the Hasbrouck; I repaired this injury in November last, so as to shut the hole up. I examined the wound; the outside plank is three inches, and the ceiling a three-inch plank; timber is 8 by 9; one timber was broken and the ceiling stove through. The hole was twenty-two inches in diameter; the timber was oak—sound oak; the blow was very nigh square, through a little on an angle. There was a mark on the guard which showed where stay hit, and that gave us the angle—a 6° or 7° angle. The hole was a little aft.

JUNE 24*th*, 1870.

FREDERICK HERMAN, being duly sworn and examined, says: I was on the Hasbrouck, was on her bow, forward of the pilot-house, as lookout. I saw her coming down round the point; I ran right up in the pilot-house; I was on the starboard side, and gave him a hand to help to heave the wheel; the bow of the steamer was sheered to eastward. I first saw the green light of the sloop; she was, I think, about a mile or three-quarters of a mile off; I couldn't tell exactly; I saw her red light next. The sloop went about two lengths when she shut the red light in; we were then about two of the Hasbrouck's lengths from the east shore, the sloop heading right across to eastward after she shut in the red light. We kept sheering all the time to the eastward. We began to sheer to eastward so soon as I got up to the pilot-house. I was outside of the pilot-house when I saw the green light, and was in the
34 pilot-house when I saw the red light. The sloop was coming right across to eastward as she approached us. The wind was N. W.—quite a good breeze. I saw vessels going down—two of them; they had the wind N. W. Between two and three miles below the point other vessels I saw were; I saw no vessels after that; at the

collision our vessel was about two lengths from the east shore—I mean from the east land. The West Point light is about three-quarters of a mile from the place of collision—abreast of us, to our bow.

Q. What did the captain of the sloop say next morning, on the float, to Mr. Squires?

(Objected to; taken subject.)

A. He said he couldn't help himself—the wind was S. E. I didn't hear him say anything more. He didn't say anything about the helm that I heard. I went into the wheel-house to give him a hand to put the wheel over just as hard as we could, to get her bow to eastward. The pilot blew the whistle before I went up in the pilot-house. He sheered her right a few minutes after I went in, and stopped her entirely. At the collision our boat was still; we might drift a little astern on account of the ebb-tide. I think the sloop was going about as fast as we could make headway; she was going pretty lively over.

Cross-examined:

When I say the pilot stopped the boat, I mean he stopped the engine. He was putting the wheel over when I went into the wheel-house; I generally go in when the wheel was to put over; considered it necessary to go in; no one called me into the wheel-house; I always do that with both first and second pilots, on account of the hard work. It is pretty hard to heave that wheel over. I started in to keep clear from her. I generally go in at Magazine Point and West Point, so he may get along easier, that is all.

35 Redirect:

I go in because it needs two men to manage the wheel.

Recross:

I suppose one man can manage that wheel as well.

HARVEY BULLIS, being duly sworn and examined, says: I remember this collision; I was on the barge Ulster County, on the starboard side of the propeller; I was a passenger then; I have been boating on the North River 17 or 18 years. I have been a hand, and a first hand, on a sailing-vessel and on a steamboat.

I heard the propeller blow her whistle, and came on deck immediately then; I was sitting in the cabin; I heard her ring her bells to slow and stop, and she was stopped when I got on deck; when I got on deck she was about on a northeast course; she was two or three lengths from the railroad track and about her length from the edge of the channel. The water is bold there. The steamer was drifting down river a little when I got on deck; and at the collision I saw the sloop, but not before the collision; I saw her sink; I know Burton the boatman, first hand of the Venus; I had a conversation with him after he came on deck.

(Objected to; taken subject.)

I asked him how he came to get so far to leeward; he said she was falling off all the while. I asked him if he had the sail all up, and he said no. I asked him what was the reason he didn't have the sails all up, and he said the wind was so heavy at the Wanagut—we came through under bare poles, the wind was so heavy; he said he got the
36 jib on her when they got down below Cold Spring, and when they came round Magazine Point they went getting up mainsail, and while they were getting up mainsail the captain called him aft to trim the sheet, as she wouldn't steer—wouldn't mind her helm.

He said he was after trimming sheet in when they came together. Wind that night was blowing northwest; from the city of New York up there was a good stiff breeze; wind at the time of collision was enough to have taken vessel with ebb-tide seven to eight knots an hour with that breeze. I saw vessels in race, and one off Cowesink Island, going down with the wind northwest. I had not been below more than fifteen minutes; it was about that time before the collision that I saw these two vessels. The barge Ulster Co. had some freight—from ten to twenty tons.

Cross-examined:

I passed the vessel at Cowesink Island, one mile and three-fourths below Cozzens Dock; we went to the eastward of that vessel. I think from 15 to 20 minutes after that I heard the whistle; I had no watch to tell the time exactly; when the whistle blew I started, and while I was coming out the bell rung; when I got out I walked aft on the barge, half-way, about-sixty-five feet; vessels had struck when I came on deck. I did not start to go up till I heard the bell; I was sitting down; I had not got up on the deck until after the collision; I walked from ten to fifteen feet before the blow.

Captain Cornell, Weeks, the watchman, and quite a number were present at the conversation of the first hand; I think the engineer was there—am not quite sure; the mate of the barge was there, and
37 also deck-hands of the Hasbrouck. I felt the blow before I reached the stairs to go up on deck; I started to go down when I heard the bell. I saw the stern of the sloop sinking as she passed the Hasbrouck's stern.

MARTIN DECKER, being duly sworn and examined, says:

I was on the barge Ulster County on the night of the collision; I was mate; I am a boatman, and have been such 12 or 14 years; I was not any time to amount on sailing-vessels. I was on watch about midships on Ulster County; I heard the Hasbrouck whistle; I went up forward and then I heard the bell to stop. I opened the slide door; I saw the sloop coming right into us; the sloop was then close by us; I did not see her lights; I think I saw some sails, am not sure. The wind was northwest; there was a pretty good breeze. We was bound up, and the sloop was going eastward; I thought our vessel was not far from the east shore, though not any further than she ought to have been—close in as she could be; it was not a length from the side of the barge to the edge of the channel; our boat bearing a little to westward, before collision she was bearing a little to the east; I cannot say how our boat bore; our boat was heading to the north, up the river, at the blow; not heading to either side of the river. The wind blew fresh when we started, and when we were going round West Point. I saw vessels that indicated the wind; I was in the pilot-house at starting, and knew the wind blew fresh. We had ten or fifteen tons of freight; that was no load at all; she can carry 1,600 bales of hay.

I don't know of having a conversation with the men, except the cook, who said he was down below, asleep.

(Objected to.)

38 Cross-examined:

I was about midship of the barge when I heard the whistle blow; I went from where I stood right forward to the slide; before I opened the slide I heard the bells; the slide was on the forward end of the boat.

I have been mate of this barge three or four years. There were two lights on the main deck where I stood; I didn't come out of anywhere when I saw the sloop; I didn't go out through the slide; as soon as I looked out I saw the sloop; she might have been a length or a length and a half off; she was in the neighborhood of that, I judge. She was pointing for the steamboat's forward part, about forty-two feet aft her stern. The Hasbrouck's stern was, at the farthest, ahead of the barge's stern 35 or 40 feet. The slide was about twelve feet from the stern of our boat.

Redirect:

The sloop struck at about 42 feet aft the Hasbrouck's stem; when I saw her she was heading right into her.

Recross:

I saw and heard her strike.

Redirect:

I stood at the forward hatch on the Ulster Co. It is about 20 feet aft the slide door.

(By the court:)

I saw her strike, and looked through the forward gangway of the Hasbrouck when I saw her strike.

Recross:

39 When I saw her first I stood at the slide; I did not then look through the gangway of the Hasbrouck; I went back to the hatch before she struck. The Ulster Co. is not sided up opposite the hatch on the side; I could look right out there; there are only stanchions there; the upper deck on the Hasbrouck ran over the gangway forward; the gangway opened in her house, so you could see right through; there were lights on the Hasbrouck; I could see by the light on her deck that there was lights on the deck.

PETER HILL, being duly sworn and examined for claimant, says: I have been boatman 15 or 20 years, mostly on the North River. I am captain now, and have been for six or seven years. I know the sloop Venus. I last saw her last November. She lay at anchor at the high bluff above Newburg. It was about 8 p. m., I should say, on Saturday. I was on the sloop Livingston. The wind was N.W. I was bound down the river to New York from Saugerties. We caught the wind at Downeschaum. We went down to Caldwell's that night; went below there at 12 at night. The wind was northwest during the whole of the voyage. I should call it a two-reefed breeze. My sloop had all she wanted to do with it, and she is an able sloop. I anchored at Caldwell's because it blew too heavy for me. A sloop coming round West Point with the wind S.W., close-hauled, can lay down to Garrison's. With a W. S.W. wind she could lay down to Cowesink Island, sure. With the wind S. W. or W. S.W. a vessel would not be on her proper course if 200 feet from the edge of the channel abreast of the draw, a little below it.

(Objected to.)

She would not be on her proper course at that place if the wind was N.W.

40 Cross-examined:

I have never had a quarrel with the libellant that I recollect. I mean to say that no matter how the tide is, a sloop with the wind N.W.

has no business to be within 200 feet from the edge of the channel off West Point. She has plenty of room to westward, and should keep about the middle—about that. I would not think it unusual, though, to meet a vessel coming down there to the east of the middle, with the wind N.W. It was starlight when I saw the Venus. It was after 7 p. m.; about 8 p. m., and one-half an hour after. I didn't look at any clock. I got under way at Downscham, about two miles above where the Venus lay. I came to anchor there because of want of wind. There had been little wind all day to the southward, I think. When I saw her she was eight miles or over above West Point. I passed West Point about 10½ p. m. The tide was flood when I got under way; it was the last of the flood; the ebb made about 9 p. m., I suppose. I was then four or five miles above West Point when the ebb-tide made. I judge it to be ten miles, or not so far, below West Point when I came to anchor. I don't recollect the day of the month I saw the Venus. My attention was first called to the fact of the collision after I got to New York, and by Mr. Haskett yesterday. Mr. Isaac, over there, first called my attention to the fact that I passed her. I passed the Venus within a couple of hundred yards.

Redirect:

I was carrying blue-stone from Saugerties. The Venus was carrying blue-stone from Catskill. I have known the Venus for years. I
41 heard of the loss of the Venus the Monday or Tuesday following that night. I have met vessels on the east side of the river at that place, with the ebb-tide and N.W. wind. There might have been several vessels, and some would be taken there. There is not room for them.

Recross:

I don't know as I ever met a single vessel to the east there, with the wind N. W. I would think a vessel would be out of her course if I saw her there. I would think there was something the matter with her if I saw her there.

Redirect:

I mean that I should think she had a master who didn't understand his business.

JOHN HOPTON, being duly sworn and examined, says: I have been steamboating for nine years, and eight years slooping on the Hudson River. I have been in all capacities—have been captain and pilot nine years. I am on the Madison County, towing to Newburg. I was on the America, running to Saugerties, as pilot, last November. I know the Hasbrouck; I run up the same nights she did; I recollect the night of this collision; I left New York at 5 p. m. that day; the Hasbrouck's time of leaving was the same; I was ahead of her at first, and she passed me up towards the Highlands; I was in sight of her when she got up by West Point, and was steering after her lights; might have been a mile astern. The wind was N. W. or N. by W.; it blowed a good heavy breeze. All the vessels I met in the Highlands were double reefed; I saw other vessels sailing down; I don't recollect meeting a vessel just by West Point.

42 I saw a red and a green light coming round the point, before the Hasbrouck got up to the point; I saw the Hasbrouck go up on east shore; I was in her track. We generally take a broad turn at the point, a big sweep to eastward, so that we can see up for safety. I first

saw a green light, and then a green and red, and then the green light; then I lost sight of it when I got up there; I saw a schooner at anchor above the last flat. The green light I saw was going to eastward—passing to east. After I lost the green light I saw the Hasbrouck go to west shore, and when I went by her she was over there, just straightened up; she lay on the west shore below the point. I didn't know there had been collision; I thought the Hasbrouck had broken down; I learned that there had been a collision the following Wednesday, when I got back to New York. Captain O'Brien, of the Venus, told me of it, and also Squires, pilot of the Hasbrouck.

With that wind and tide the course, if properly taken, would bring a sailing-vessel round there best to westward, the middle of the river certain. With the wind northwest, and properly-trimmed sheet, you can come right straight on down there as you can with a steamboat.

Cross-examined:

I could see any sheer on the Hasbrouck by her lights, very easily, going up by the light-house; we go away around to east there; all steamboats go that way there all tides. I saw a green light, then a green and red light for a short time; it was so short a time that I saw a green and red light that I can't give the distance we ran.

I saw their green light, then lost that, and then saw the Has-
43 brouck sheer to west. From the time I saw the green light first till I saw the Hasbrouck sheer to west I saw no change. After I saw the light, or about the time I saw the last light, the Hasbrouck sheered to eastward; she didn't sheer to eastward much, and that was just after I lost the red, and the green was in view. She hadn't much to sheer. I don't recollect hearing a whistle from her. I had the wind all way up-river that night. I should judge the Hasbrouck was just off Garrison's when I saw the light first; I was about off Cowesink Island; she had not begun to sheer to east to swing round the point when I saw the light. I was on a straight course right behind her—a mile below her, say; my course would carry me by the point on a straight course till we got above the boat-house near the point, on the east side, abreast of the light; we don't change until we get above the boat-house near the point, and then we sheer to west. I go so close to east shore at the boat-house point that we could throw a stone ashore. I turn to west when I can see up by the point to west. This is the usual course for all steamboats. The course I was on at Garrison's would carry me on this course without any sheer to east.

FREDERICK BELL, being duly sworn and examined, says: I have been pilot on the North River for three years on steamboats; on other vessels, sailing-vessels, about eighteen years and over. In November I was on the steamboat Thos. Powell; last Saturday in November I left New York about 5 p. m.; I go up to Catskill; I went by West Point between 10 and 11 p. m., and at 12 was just below Downschaum Point. The wind was N. W. that night on the river; a good fresh breeze till we
44 got up to the Highlands, and then it blowed what I call a gale. I passed several vessels that night coming down with two-reefed mainsail and less. With the wind S. W. and ebb, a sailing vessel coming down by West Point would fetch down below Garrison's on that reach, and further.

(Objected to.)

With the wind N. W. she got to lay right down by getting in a little sheet.

Cross-examined:

Garrison's is about half a mile below West Point; a vessel properly manœuvred and managed would reach down to Garrison's with the wind S. W. I think the river at Garrison's is less than a quarter of a mile straight across. I think the river a little wider from West Point to two railroad bridges opposite. I made no memorandum of the wind; I can't say positively how it was the next night I went up nor on the night before.

Redirect:

I saw the hole in the Hasbrouck after I got down to New York on Monday or Tuesday after. It was just forward of her gangway on the port side.

My landing at Cold Spring called my attention to the wind on the night in question in particular; it blew very heavy. I saw an object I had to stop for, and it proved to be a small boat with sail. I think I landed at Cold Spring at 10½ or 11 p. m.

From the forward end of the house of the Hasbrouck is 20 or 30 ft. aft of the stem. The hole was aft the forward end of the house, just forward of her gangway, five or six feet forward of her forward gangway; she was then sided up for a small space forward of the forward gangway. I think she has never been sided up more.

45 CASPER CLOUGH, being duly sworn and examined, says: I have been a boatman 25 years on steamboats and sloops. I was 18 years on sloops, pilot-hand and captain; have been captain of sailing-vessels for ten years, about, on the North River; am now pilot of the D. S. Miller, a propeller, which runs from Poughkeepsie to New York. On the last Saturday of November I was bound down the river from Poughkeepsie; I left at seven o'clock; as we came around West Point, between 10 and 11, about 11, the wind was then N. W.; it was the same about 12 m. I remember seeing sailing-vessels that night; those I saw had on two reefs; the wind was N. W. I heard of this collision on the Sunday after, or Monday. A vessel ought to go down to Garrison's, with the wind N. W. and ebb-tide, at West Point, if properly navigated; with the wind N. N. W. she would go down to Cowesink. I know the Hasbrouck; I have worked her. The wind was strong N. W.; the Hasbrouck was heading up, with a barge on the starboard side. If she undertook to back, her head would go to starboard; when she backs she cants her bow to starboard—anyhow, the wind N. W. would help her that way.

Cross-examined:

I made no memorandum of the wind on that night; I don't recollect how the wind was on next day; I can't tell how it was on the second Friday of October or the first Friday of November, nor on the last Friday of November.

The Hasbrouck is a right-handed propeller—that is, as she goes ahead her screw turns from left to right; with the wind heavy N. W., backing would throw her bow off to starboard quickly.

46 ABRAHAM CRAPSER, being duly sworn and examined, says: I have been engineer twenty-one years; I was on the Hasbrouck in charge of the engine at this time; I heard the whistle; five minutes after I got the signal—one gong means to slow; by the time I had slowed the engine I got a signal to stop, and did so. I got no other

order before the collision; I felt the blow a full minute after the engine stopped. We had been going seven or eight miles, by land; I should think the vessel was not going ahead through the water at the blow. The engine is on the deck, and we can see out at the side or aft; I didn't see the vessel before the collision; I came out after the collision; saw the schooner's topmast on the starboard side to eastward, right past the barge's stern, between us and the east shore—right about abreast of us. The schooner was at anchor there. After the collision I heard the captain of the sloop speak of the collision. Squires asked him what he was doing to go so far to eastward when he had plenty of room to west; he replied that he couldn't get to westward, the sloop wouldn't mind her helm. He made a remark—they calculated to overhaul the vessel that winter, and he would get rid of that job. I don't recollect anything more from him.

(Objected to.)

Q. Did you hear the first-hand say any thing about the collision in presence of the captain of the sloop?

(Objected to. Taken subject to objection.)

A. Yes, sir.

Q. What was it?

(Objected to.)

Squires was speaking to the captain of the sloop at the time,
47 and the first-hand spoke about all hands being aft trimming in the main sheet. In the same conversation the first-hand was asked where he was, and he then said all hands were forward getting up sail. I then said how was it that all could be aft and also forward getting up sail; and the man got angry, and said he didn't want to be cross-questioned, and wouldn't answer any more. This was in the work-room of the Hasbrouck, right after we got off on our course, and things had got settled—twenty minutes or one-half an hour after the collision. I stepped on deck half a minute after blow; I was expecting signals, and stepped right out; can step out and not leave the engine.

When I stepped out, the Hasbrouck was close on the east shore; I judged by the angle of the hills, as I had to look up. She was not more than two boat-lengths from the edge of the channel, hardly that. I should judge she was right abreast of the draw-bridge when I stepped out; I judge from the make of the land, which I know well, and by which I could tell that; I noticed the Ansonia as I stood on the deck after the engine was stopped.

Cross-examined:

This was after I stopped the engine and stepped on deck, before the blow; I saw her looking aft. I stood when I saw her before the blow on the starboard side of the boat, outside of the engine-room, close to the rail; I had partly turned to go back when the blow came. I stood there about a minute or short of a minute; one step took me on deck; I stood 25 or 30 feet from the stern-post. The engine-room door opens aft, on the starboard side; aft is the house from bar and work-room; it is
not so wide as the engine-room; they extend fifteen feet aft; from
48 the engine to the rails is four feet—three or four feet; she is not there boarded in; she was boarded in forward, but not within twenty feet from the stern, ten or twelve feet from housing. The barge's stern came right about ahead of the engine-room. I saw the Ansonia just clear of the bar-room, a little on the port quarter; I looked past the bar-room and could see her; she appeared to be coming up a little to leeward of our course. The schooner I saw lay right between us and

the shore; after I caught the topsail I could see her hull when I looked down; I could have tossed a biscuit on her, I think; there was not room for another barge to lay between our barge and her.

HENRY SQUIRES, being duly sworn and examined, says: I am pilot; have been boating 22 years; have been seven years on sailing-vessels—from cook to captain—on the North River; fifteen years steamboat pilot; I was pilot of the Hasbrouck at this collision; we were about by the draw-bridge on the railroad at the collision, I was ahead at the time of the collision; the blow called me out; I didn't see the sloop. When I came out we were about 230 feet from the edge of the channel; that she was passing down by the tide; we moved over to the west within half a minute after I came out; we had not got the crew of the sloop on board when we started. The wind was N.W., about a two-reefed breeze. We straightened down towards Garrison's, and then, after, we got headed around and went down to just above West Point dock. We came round over to eastward again, and took the crew on board. The captain of the sloop said the cause of the collision was that he couldn't make his sloop luff. I asked him why she wouldn't
49 luff, and the first hand said the wind was S.W., and was aft trying to get the sheet in; said he had his helm down at the time. The engineer then asked the first hand where he was; the first hand said he was forward getting sail up. The engineer asked him how all hands could be forward getting sail up and be trimming sheet in at the same time, and he said he didn't want to be cross-questioned, and wouldn't say anything more about it.

(Objected to.)

I had a few words with the captain of the sloop next morning, on the float.

(Objected to.)

He came down on the float stage by the end, and said, "Just as I thought, a glancing blow." I said, "It don't look much like a glancing blow, with that hole and mark of the jib stay on the guards, about opposite the hole." I says to him, "You say the wind was S.W.? You know better, captain; you know the wind was not S.W." He says, "Well, I couldn't help it." I don't remember anything more.

The Hasbrouck at this time was boarded in a very little forward; she was boarded in from about eighteen feet from her bow for about fifteen feet. The housing stopped aft the forward gangway. I saw the schooner at anchor; she lay between us and the railroad, not over the width of the barge from us on our starboard side. When I came on deck I saw no sails on the schooner; I would have known it if she had sails up.

Cross-examined:

We started after the blow, and sheered round to westward with the wheel hard a-starboard. We got head to wind, and after we had canted her a little to east of southward, started again; we were out
50 in the middle of the river then; we hadn't been any further to west than that after I got on deck, a little above the point then, so I could see the west shore when she was head to wind. I suppose she was a little below the light when we got E. of S., then kept steady down toward the boat-house, then rounded to westward. The object of going down was to see what had become of the sloop and crew. We ran perhaps one-quarter of a mile to get there; we didn't find them. We rounded to westward and came back, and then found the crew; I

think they came ahead between the boat-house and the drawbridge. The drawbridge is further up than the boat-house. I held the wheel as we rounded to. The schooner lay heading a little to the westward, probably heading N. by W., I should think.

Redirect:

I can turn the Hasbrouck in twice her length, sometimes; it didn't take over half the river that night. I saw the America go by us; she went by our starboard side to east of us, a little above West Point dock, ten or fifteen minutes after the collision; she passed us before we picked up the crew.

Cross-examined:

We had rounded to and gone down by the boat-house, and over to westward before the America passed us.

ISAAC C. WICKES, being duly sworn and examined, says: I am a steamboat owner; I am one of the claimants. I was on board at the collision; I heard a whistle, and that called my attention; I was in bed; I didn't get up till I heard two bells; then I got up, shoved up the window, and looked out on the larboard side; I saw the sloop
51 just as she struck us; she was heading square into us; she came pretty heavy—knocked the pitcher out of the washstand in my room; my room was nearly over where the sloop struck us; my room was about eight or ten feet further aft than where she struck. I went out after she struck; I knew we were close on the east shore. I didn't see the schooner lying at anchor; I saw the captain and crew of the sloop after they came on board, and had a conversation with the captain of the sloop; some one asked him what he was doing; he said he was getting up sails; I soon went up stairs; as I was not fully dressed, I came back again; I heard the captain of the sloop say, she wouldn't at all times mind her helm; he said that when asked why he came to run into us. There was a good strong breeze blowing down the river. I don't know the points of the compass there.

Cross-examined:

The sloop had lights; I think one was red, the other green or blue. I had been asleep.

ROBERT D. CORNELL, being duly affirmed and examined, says: I follow the river; was on board the Hasbrouck; I am one of the owners; I have never followed the water as boatman on a sloop; I was on board the Hasbrouck; I am master of her; I have been sailing five years as master on the river; I was lying in a room in the saloon; the ringing of bells called my attention; I got up and came out; I heard bells to slow and stop, and can tell by feeling when the engine stops; I ran out of the saloon aft on deck; went to the port side; I saw something go down by the side of her with sails; I felt the blow; I was in the saloon going aft; my room was about sixty feet from the stern, star-
52 board side; I was nearly out of the saloon at the blow; I had run forty feet about; I started to run at the second bell; I then ran to the pilot-house on the upper deck, and we were then abreast of West Point light, pretty well to the east shore. The wind was blowing quite heavy, and we were drifting; we was in range of the drawbridge, as near as I could judge; I saw something lay astern of us, astern of the barge, just in starboard of the steamboat aft, pretty close to the shore. I wanted to get the men, and we were drifting. The

wind blew, and the pilot started ahead; we rounded to until we found them; the wind was blowing a stiff breeze from the N. W.

I saw the captain of the sloop after he came on board; I was present at the talk in the bar or wash room. I asked the captain of the sloop how he came to be so far in to the east shore. He said his boat wouldn't mind her helm; he couldn't make her luff. The first hand was there, and I asked him where he was; he said he was aft, trimming the sheets. The pilot and the engineer talked with him.

(Objected to.)

A while afterwards, in the bar-room, this man said he was forward, and the last man to leave her.

(Objected to.)

The captain was present at this last conversation.

The Hasbrouck was then housed about fifteen feet—that was all the siding was on her below her saloon-deck. I know the barge Ulster Co.; she was housed in a little forward, and I think a little aft—one or two stanchions aft. She is about 155 or 160 feet long.

Cross-examined:

She is now more housed in; I can't swear that she is more
53 housed in; I don't know whether any work was done on her last winter. I signed the answer in this case, and swore I knew what was in it. I thought and I intended to swear to the truth. The schooner was about thirty feet astern of the steamboat, on the starboard quarter. The blow had occurred when I got out of the saloon. I think she was dead in the water then—not moving by the land, I mean—and when I got on the upper deck, I think she was sagging down; we were then just abreast of West Point light.

(Claimant rests.)

MATHIAS TURNER recalled and examined, says:

I am watchman on the railroad; I saw Captain Pease up there sounding, and saw where he had his boat sounding; I don't think the boat was a rod from where I saw the spar came up—not over a rod, if that.

Cross-examined:

It was last Saturday I saw the boat; I was at home at Garrison's then; it was 11 or 12 m. then; I was running a boat; was going up to my boat to show this gentleman the line from my shanty where the spar came up. When the spar came up I took a particular range of the place, and by that pointed it out, while the spar stood butt-end up. I lined the spar by the shanty and a big rock, and I showed that range; I didn't show the range to Pease, but to this other man there; I showed but one range; I took another from the draw-bridge and a big willow on the other shore. It stood in the same place with the same range, till the raft took it away a day or two after. It stood from Friday to Wednesday.

JOHN A. PEASE, being duly sworn and examined, says:

54 I have been steamboating; am now in no business. I was up there sounding. As I figure from the chart, I make the river 1,960 feet wide; where I sounded I found 144 feet with clean lead; there was about the width of the room anyway, there was 155 feet foul lead, a mud bottom; this was at the place where the bearings were given me by these men; I moved from the boat, anchored over the clear place to the eastern shore to the railroad, and found it 872½ feet, and to the westward shore,

1,072½ feet to West Point, on the westward shore. I measured the width of the river and the distance by spun yarn; the whole width was 1,945 feet. The tide was a little ebb.

Cross-examined:

I measured to a point below the bridge on the railroad, I mean the little bridge, the lower bridge, which is called the draw-bridge; I measured it just below the south bridge. I live at 242 Prospect st., Brooklyn; I have been engaged in sounding for many years, and understand it. I have sounded at this place long ago; I sounded on the range inshore. We drifted a little off down, the width of the room, before we sounded the second time; we only sounded two leads there; we measured from the place where the boat brought up by grapples, as near as I could get it, over the place where the clean lead came.

The main-mast were on the range given me by the railroad trackman, and the other by a ferryman.

We measured it to a point on the west shore, about 100 yards below the light-house.

ISAAC BENTON, recalled and examined, says:

I was there when the last witness measured; as near as I could judge, it was very near where the sloop went down.

(Rest.)

55 JUNE 29th.

JOHN MULLER, being duly sworn and examined, says:

I am hospital-steward in the U. S. Army at West Point; I have been there at West Point 13 years; we keep meteorological records there, including the wind; I keep the paper and take the observations; there is an official record; I cannot bring it here. The last observation of each day is 9 p. m.; I have a copy of the record of the 27th and 28th of November, 1869; at 9 p. m. of the 27th of November, at West Point the wind was S. W. The strength was 3°; two is calm and ten a hurricane; I call a slight breeze 3°; the next morning at 7 a. m. the wind was N. 3°.

The wind often dies out while in one direction before beginning in another direction.

Cross-examined:

Aside from this copy of the record I have no recollection.

Redirect:

The original record is made by me daily from the observatory. The elevation of the point of observation is about 100 feet above the river; the hospital where we take the observation is below the light-house; the wind may be more interrupted on the river than at the hospital; it has a free sweep there.

Redirect:

The hospital is a little to the N. of Garrison's Landing.

Recross:

56 I have known of vessels being sunk below the Point; I should say I know of three or four sunk about there, perhaps more.

Redirect:

I saw a vessel sunk there about a week or two weeks ago, about the middle of the river; I saw the hull; I don't know where it was sunk;

it was nearer to the railroad bridge than to the hospital; I recollect an oyster-schooner sinking there; I saw the wreck of that; that was within thirty or forty feet of the old dock opposite Garrison's. I don't now recollect any other wrecks there.

(Rest.)

JUSTIN AUSTIN, being duly sworn and examined for claimant, says:

I am pilot of the ferry-boat at Garrison's; I have been there 17 years; before that I was on sailing-vessels on the river and coast. I once saw a canal-boat sunk about there, and one sailing-vessel 30 years ago.

Q. Do you know the condition of the bottom of the river just below West Point as to sunken vessels being there by general reputation?

(Objected to. Taken subject to this objection.)

A. The general reputation is that there is more or less vessels sunk there. This is the reputation amongst boatmen. The bottom at West Point has a very bold shore; the banks are very steep; you can lay the ferry-boat with one wheel in the mud and the other with forty feet of water. I remember Squires, the pilot of the Hasbrouck, coming to see me one Sunday last fall. On Sunday morning about 4 o'clock I discovered a bowsprit lying up against the shore by my house; I saw deck-boards there and hatch there. I learned from the flagman that the propeller had sunk a sail-vessel.

57 (Objected to.)

I think it was Turner, but cannot be sure which flagman told me.

The wind the night before was N. W., when we stopped running the ferry-boat. That was about 8 or 9 p. m. I was up in the night. I did not go to bed before 10. I think it might have been the middle of the night, or past the middle. I called the wind N. W. It is a bad country to tell the direction of the wind. None of us can agree as to the wind within a mile of each other there. My house is on the east shore, 3 or 400 feet below Garrison's. There are so many valleys and turns that the wind follows them. The usual course for a steamboat going up by West Point is the east shore. I saw the mast that came up there. The mast was there several days. It changed its position as the tide changed. The mast was about a third of the way from the east shore. It was about half or three-fourths of a mile above the course of my ferry-boat.

I noticed several tows coming down that they passed to westward of this mast. I consider that the tows going up went to west of it. They appeared to me to pass it to west.

Cross-examined:

I can't give the name of any vessel that is sunk there. One I saw, a schooner, sunk just above the old dock, below the Point. That was six or seven years ago. I was on his derrick when he was getting the schooner up. She lay against the bank. I saw a canal-boat go down a little ways off in the river. I saw, also, a scow sunk there, down this side of the light-house—200 feet, say. They hauled the canal-boat awhile, and she disappeared then. Boats going up with the ebb-tide hug

58 the east shore as near as they can safely go. They go one-eighth of the channel off to west, and leave seven-eighths to west of them. When they pass the light-house they calculate to throw all the channel they can to west of them. The ebb-tide runs up some strength on both sides there, except right under the Point.

When I got up in the night I considered it blowing heavy. I thought it was going to blow when I laid the boat up.

Something about the window got loose, which made me get up. My

wife called me up. I fixed the window. I don't know how the tide was when I went to bed.

SQUIRES, recalled and examined, says:

It was the day following the collision that I saw the ferry-man, as he has stated.

Cross-examined:

I went down there by the train in the afternoon—now I say in the Albany train. I got to Garrison's about 1 p. m. I should say I remained there about an hour and a half till another train. Both trains stopped at Garrison's.

(Rest.)

59 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court rooms in the city of Brooklyn, on Friday, the 9th day of December, in the year of our Lord one thousand eight hundred and seventy.

Present: the Hon. Charles L. Benedict, district judge.

PETER LYNAN
vs.
THE STEAMBOAT J. L. HASBROUCK, HER tackle, &c.

This cause having been heard upon the pleadings and proofs, and submitted upon the arguments and briefs of the advocate for the respective parties, and due deliberation having been had, now, on motion of Wm. Jay Haskett, esq., proctor for claimant, it is ordered that the libel herein be, and the same is hereby, dismissed with costs, taxed at one hundred and ninety-seven and $\frac{48}{100}$ dollars, and that the libellants be condemned to pay the same.

And it is further ordered that unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this court, the stipulators for costs on the part of the libellants cause the engagement of their stipulation to be performed, or show cause why execution should not issue against their goods and chattels.

CHAS. L. BENEDICT.

60 (Endorsed:) U. S. district court for the eastern district of New York. Peter Lynan vs. The Steamb't J. L. Hasbrouck, her tackle, &c. Decree dismissing libel. Wm. Jay Haskett, proctor for claimant. Filed and entered the 9th day of December, 1870.

U. S. district court, eastern district of New York.

PETER LYNAN
vs.
THE STEAMBOAT JOHN L. HASBROUCK, her tackle, &c.

Please to take notice that the libellants appeal from the decree herein his part thereof to the next circuit, to be held in and for the eastern district of New York.

Dated Dec. 12th, 1870.

Yours, etc.,

A. McCUE,
Proctor for Libellant and Applt.

To WM. J. HASKETT, Esq.

SAMUEL T. JONES, *Clerk.*

61 (Endorsed:) U. S. district court. Peter Lynan vs. The Steamboat J. L. Hasbrouck, her tackle, &c. Notice of appeal. A. McCue, proctor for libellant and applt. Samuel T. Jones, clerk. Filed Dec. 14th, 1872.

To the honorable the circuit court of the United States for the eastern district of New York.

The petition of appeal of Peter Lynan respectfully shows:

That on the 7th day of December, 1869, the libellant filed his libel in the district court of the United States for the eastern district of New York against the steamboat J. L. Hasbrouck, her engines, tackle, apparel, and furniture, claiming in said libel that the vessel of the libellant, the sloop Venus, had been run into and sunk on the Hudson River by the said steamer, and that in consequence thereof the said sloop was entirely lost by and through the negligence of those in charge of
62 the steamer, and claiming damages therefor, and asking that process might issue from said court against said vessel, the J. L. Hasbrouck, her engines, etc.

That process was issued on said libel, and the said steamboat arrested, and the owners thereof duly appeared and claimed the same, and put in their answer in substance as the libellant claims, admitting their gross fault, but in words denying that the collision occurred by the fault of the persons on the steamboat, and alleging in words that the collision occurred by the fault of the libellant's agents and servants.

That such proceedings were had in the said district court that the said cause was tried therein; and on the 9th day of December instant, a final decree thereon was rendered dismissing the libellant's libel, and rendering judgment against him for the costs, amounting to $197 $\frac{48}{100}$ dollars.

That the libellant alleges that the said decree was wholly erroneous and contrary to law, as he is advised and believes, and he therefore appeals from the said decree, and every part thereof, to the circuit court of the United States for said district, and asks that the circuit court may proceed to hear the said cause anew on the pleadings already put in in said cause, on the evidence already taken, and such other evidence as may be put in the said circuit court, and that said circuit court would be pleased to reverse and annul said decree, and to decree in favor of libellant, or to make such decree as may be right and just in the premises, and he will ever pray.

A. McCUE,
Proc. for Appellant.

63 (Endorsed:) U. S. circuit court. Peter Lynan ads. the Steamb't J. L. Hasbrouck, her tackle, &c. Petition of appeal. A. McCue, applt.'s proctor. Filed December 21st, 1870.

I hereby admit due and timely service of a duplicate of the within. Dated December 21st, 1870.

W. J. HASKETT,
Proc. for Claimant.

Circuit court of the United States of America for the eastern district of New York, in the second circuit.

PETER LYNAN, LIBELLANT AND APPELLANT,
vs.
THE STEAMBOAT J. L. HASBROUCK, ROBERT D. Cornell, et al., claimants and appellees.
} Bond for costs.

Know all men by these presents that we, Peter Lynan, James Whelan

and E. M. Cullen, are held and firmly bound unto the above-named claimants and appellees in the sum of two hundred and fifty
64 dollars, to be paid to the said claimants and appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 16th day of December, in the year of our Lord one thousand eight hundred and seventy.

Whereas the above-named Peter Lynan has prosecuted an appeal to the circuit court of the United States for the eastern district of New York to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named libellant and appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PETER LYNAN. [L. S.]
JAMES WHELAN. [L. S.]
EDGAR M. CULLEN. [L. S.]

Sealed and delivered and taken and acknowledged this 17th day of December, 1870, before me.

D. C. WINSLOW,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

James Whelan, (cor. Franklin and Atlantic aves.,) E. M. Cullen,
65 being duly sworn, each depose' and says that he resides in the city of Brooklyn, that he is worth the sum of five hundred dollars over and above his just debts and liabilities.

JAMES WHELAN.
EDGAR M. CULLEN.

Sworn to this 17th day of December, A. D. 1870, before me.
D. C. WINSLOW,
U. S. Commissioner.

(Endorsed:) U. S. circuit court. Peter Lynan, libellant and appellant, vs. The Steamb't J. L. Hasbrouck, R. D. Cornell, claimant and appellee. Bond for costs on appeal. A. McCue, proctor for appellant. Filed this 17th day of December, 1870.

66 Stated term, November 9th, 1872.

Present, Hon. Lewis B. Woodruff, judge.
Court open by proclamation.

PETER LYNAN
vs.
THE S. B. JOHN L. HASBROUCK.

Hearing on appeal; both sides ready; Mr. Donohue, counsel for appellant, opens the argument.
Mr. Benedict, for appellee, follows.
Mr. Donohue closes.
Briefs handed up.
Decision reserved.

67 Circuit court of the United States for the eastern district of N. Y.

Chas. Donohue.
PETER LYNAN, APPELLANT,
vs.
THE STEAMBOAT JOHN L. HASBROUCK, HER tackle, appellee. } Feb'ry 25th, 1873.
R. D. Benedict.

WOODRUFF, *Circuit Judge:*

Upon a full consideration of the pleadings and the evidence, in which there is great conflict, my conclusion is that the collision in this case was solely due to the fault of the libellant schooner.

The grounds of that conclusion are in substance the same as were stated in the opinion of the district judge.

Let the libel be dismissed with costs.

68 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second circuit, held at the United States court rooms, in the city of Brooklyn, on the 25th day of February, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Lewis B. Woodruff, circuit judge.

PETER LYNAN, LIB'T AND APPELLANT,
vs.
THE STEAMBOAT JOHN L. HASBROUCK, CL'TS & appellees. }

The above cause having been heard upon the appeal of Peter Lynan, libellant, and having been argued by Robert D. Benedict, esqr., on behalf of the claimants, and by Charles Donohue, esqr., on behalf of the libellant, and due deliberation having been had thereon:

69 Now, on motion of Wm. Jay Haskett, proctor for the claimants, it is ordered, adjudged, and decreed that the decree of the district court herein in favor of the claimants be, and the same hereby is, affirmed, with costs to be taxed by the clerk in favor of said claimant.

Enter.

L. B. WOODRUFF,
Circuit J.

(Endorsed:) In admiralty. U. S. circuit court, eastern district of New York. Peter Lynan, lib'l't and appellant, vs. The Steamboat John L. Hasbrouck, cl'ts & appellee. Interlocutory decree. Wm. Jay Haskett, proctor for appellees. Filed and entered April 1st, 1873.

70 U. S. circuit court, eastern district of New York.

PETER LYNAN
vs.
THE JOHN L. HASBROUCK, HER TACKLE, &C. }

I consent that R. L. Benedict be substituted as proctor for the claimants herein in my stead.

W. JAY HASKETT,
Proctor for Claimant.

Ordered according to above consent.

CHAS. L. BENEDICT.

(Endorsed:) Consent to substitute. Filed Sept. 22nd, 1874.

71 At a stated term of the circuit court for the eastern district of New York, in the second circuit, held at the United States court-rooms in *in* the city of Brooklyn, on the 23rd day of September, in the year of our Lord one thousand eight hundred and seventy-four.

Present, Hon. Lewis B. Woodruff, circuit judge.

PETER LYNAN, LIBEL'T & APPL'T,
vs.
THE STEAMBOAT JOHN L. HASBROUCK, HER tackle, &'.

The above cause having been heard on the appeal of Peter Lynan, libellant, and the decree of the district court dismissing the libel having been affirmed with costs, now, on motion of R. D. Benedict, of counsel for the claimants, it is ordered, adjudged, and decreed that the

72 claimants of the said steamboat John L. Hasbrouck, Robert D. Cornell, Joseph C. Doughty, Augustus Doughty, and Isaac C. Wicks, recover judgment against Peter Lynan, libellant, for the sum of two hundred and sixty $\frac{20}{100}$ dollars, their costs in the district court, and interest, and the sum of eighty dollars and five cents, their costs in this court, making in all the sum of three hundred and forty dollars and twenty-five cents. And it is further ordered that unless an appeal be taken from this decree within the time limited by the rules and practice of this court, the said claimants have execution to satisfy this decree.

L. B. WOODRUFF,
Circuit Judge.

(Indorsed:) Final decree. Filed and entered this 25th day of September, 1874.

73 United States circuit court, eastern district of New York.

PETER LYNAN, LIBL. & APPL'T,
agst.
THE STEAMBOAT JOHN L. HASBROUCK, HER tackle, &c., app'lee.

SIR: Please to take notice that the libellant, Peter Lynan, hereby appeals to the United States Supreme Court from a decree made in the above-entitled action on the 25th day of September, 1874, made by the U. S. circuit court in and for the eastern district of New York, and from each and every part thereof.

Dated October 5th, 1874.

EDGAR CULLEN,
Proctor for Appellant.

To SAMUEL T. JONES,
Clerk of said Court.
WM. J. HASKETT,
Proctor for Appellee.

Filed October 5th, 1874.

74 To the honorable the Supreme Court of the United States of America.

The petition of appeal of Peter Lynan respectfully shows to this honorable court that on or about the 7th day of December, 1869, your pe-

titioner duly filed his libel in the district court of the United States for the eastern district of New York against the steamboat John L. Hasbrouck, her engines, tackle, &c., seeking to recover certain damages sustained by your petitioner through collision of said steamboat J. L. Hasbrouck with the sloop Venus, owned by your petitioner, claiming more than two thousand dollars.

That thereafter the said claimants of the said steamboat duly appeared and claimed and bonded the said vessel, and filed their answer in said cause.

That thereafter said cause came on to be heard before the said
75 district court, and, after due trial and argument thereof, it was by the said court ordered, adjudged, and decreed that the libel of your petitioner be dismissed with costs.

That your petitioner thereupon took an appeal from said decree to the circuit court of the United States, held in said district, and the same in due course came on for argument, and after hearing the said decree was by the said circuit court in all respects affirmed with costs to be taxed.

That your petitioner feels aggrieved by said decree, and is advised, & therefore insists, that the same and the decree of the district court aforesaid is erroneous, in that it should have been for the claim and the costs of your petitioner, and not in favor of the claimants, and that he has and hereby does appeal from the same to this honorable court.

Wherefore your petitioner prays that this honorable court would be pleased to hear said cause anew upon the pleadings and the proofs
76 already in said cause, and such further testimony as shall be lawfully presented to this court, and that this honorable court would be pleased to reverse and annul said decree, and pronounce in favor of your petitioner and for his claim and costs and such other relief as may be just.

And your petitioner, as in duty bound, will ever pray, &c.

Dated October 5th, 1874.

EDGAR M. CULLEN,
Proctor for Appellant.

(Endorsed:) Petition of appeal. Filed October 5th, 1874.

77 Circuit court of the United States of America for the eastern district of New York, in the second circuit.

PETER LYNAN, APPELLANT, *vs.* THE STEAMBOAT JOHN L. HASBROUCK, HER tackle, &c., Robert D. Cornell, Joseph C. Doughty, Augustus Doughty, and Isaac C. Weeks, claimants & appellees.	Bond for costs.

Know all men by these presents that we, Bryan McAvanay, Patrick Williams, and Peter Lynan, are held and firmly bound unto the above-named claimants in the sum of one thousand dollars, to be paid to the said claimants, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named Peter Lynan has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered

in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Peter Lynan shall prosecute his appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PETER LYNAN. [L. S.]

his
BRYAN + McAVANAY. [L. S.]
mark.

PATRICK WILLIAMS. [L. S.]

Sealed and delivered and taken and acknowledged this 28th day of September, 1874, before me.

[L. S.]

R. P. MORLE,
Notary Public, Kings Co., N. Y.

77½ UNITED STATES OF AMERICA,
Eastern District of New York, County of Kings, ss:

Bryan McAvanay and Patrick Williams, being duly sworn, each depose' and says that he is worth the sum of two thousand dollars over and above his just debts and liabilities.

Sworn to this 28th day of September, A. D. 1874, before me.

[L. S.]

R. P. MORLE,
Notary Public, Kings Co., N. Y.

(Indorsed:) Vol. , page . U. S. circuit court. Peter Lynan, appellant, vs. The steamboat John L. Hasbrouck, her tackle, &c., claimants, appellees. Bond for damages costs on appeal. Approved, Chas. L. Benedict. Filed this 5th day of October, 1874.

78 By the honorable Charles L. Benedict, one of the judges of the circuit court of the United States for the eastern district of New York.

To Robert D. Cornell, Joseph C. Dougherty, Augustus Dougherty, and Isaac C. Weeks:

Whereas Peter Lynan lately appealed to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, from a decree rendered by the circuit court of the United States for the eastern district of New York made in favor of Robert D. Cornell, Joseph C. Dougherty, Augustus Dougherty, and Isaac C. Weeks, claimants and appellees, against said Peter Lynan, libellant and appellant, stating that the said decree is erroneous in his petition alleged, and praying that the said cause may be heard anew, and that the said decree
79 may be reversed, and the said Peter Lynan has filed the security required by law:

You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday in October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Brooklyn, in the eastern district of New York, the 5th day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

CHAS. L. BENEDICT.

(Endorsed:) Citation. Filed October 5th, 1874.

80 UNITED STATES OF AMERICA,
Eastern District of New York:

I, Samuel I. Jones, clerk of the circuit court of the United States for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to (80) eighty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Peter Lynan, lib'l't and appellant, vs. The steamboat John L. Hasbrouck, appellees, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this day of October, A. D. 1874, and the Independence of the said United States of America the ninety-ninth.

[SEAL.] SAMUEL I. JONES,
Clerk,
By EDWIN B. HUSTED,
Deputy.

(Indorsement on cover:) No. 138. Peter Lyman, appellant, vs. The steamboat John L. Hasbrouck, Robert D. Cornell, et al., claimants. E. New York, C. C. U. S. Filed 14th October, 1874.

SUPREME COURT OF THE UNITED STATES

No. 138.

PETER LYMAN, APP'T,

vs.

THE "STEAMBOAT JOHN L. HASBROUCK," &C., R. D. CORNELL, & AL., CL'M'TS.

STIPULATION OF COUNSEL CORRECTING RECORD.—FILED 2 DECEMBER, 1876.

1 U. S. Supreme Court.

PETER LYMAN
vs.
THE STEAMBOAT J. L. HASBROUCK, &C.

It is hereby agreed that the printed record herein may be corrected as follows, and that an order may be entered accordingly:

Fol. 21, 6 & 7 lines, strike out "was boating," and insert "am a boatman."

Fol. 23, line 6, after "Hudson" insert "river;" and in line 16 strike out "anywhere" and insert "anyway where."

Fol. 24, last line but two, strike out "judge" and insert "give."

Fol. 25, line 9, strike out "for;" and line 13, strike out "sail" and insert "the sails all;" and line 19, strike out "amidships" and insert "or amidships;" and line 22, strike out "were" and insert "got;" strike out the period after "boat" and insert a period instead of a comma after "did," in the next line.

2 Fol. 26, 1 line, after "getting" insert "in;" and at beginning of line 10 insert "Redirect;" and in line 19 strike out "about" and insert "best."

Fol. 27, line 14, strike out "about" and insert "all."

Fol. 29, line 2, strike out "set" and insert "got;" and after "light," in line 3, insert "shut in;" in line 20 strike out "straight" and insert "straightened;" and in line 23 strike out "stern" & insert "stem."

Fol. 31, line 8, strike out "she" and insert "we;" and line 22, after "green light," insert a period; and strike out the semicolon after "red light."

Fol. 32, line 11, strike out "slowed" & insert "sheered."

Fol. 35, last line but two, strike out "Wanagat" and insert "Worrigot."

Fol. 36, fourth line, before and first line after "cross-examined, strike out "Cowensink" and insert "Conswick."

Fol. 37, line 14, before "eastward" insert "to;" and after east-
3 ward strike out the semicolon; and after "thought" insert a period; and in line 15 strike out "though."

Fol. 38, 7th & 8th lines from the top of page 18, strike out "stern" four times and insert "stem."

Fol. 39, line 16, strike out "Downesckamm" and insert "Douskommer;" and in line 22 strike out "Cowesink" and insert "Conswick."

Fol. 41, line 18, strike out "America" and insert "Ansonia."

Fol. 42, third line from top of page 20, strike out "above the lost" and insert "along the east;" and in first line, after cross-examined, insert a period after "easily;" and a comma instead of a semicolon after "lighthouse" in the next line. And in last line strike out "their" and insert "then a."

Fol. 43, line 8, strike out "Cowensink" and insert "Conswick;"
4 and line 14, strike out "near the;" and line 25 strike out "Downeschamm" and insert "Douskommer."

Fol. 44, line 7, strike out "got" and insert "ought;" and in line 25 strike out "from."

Fol. 45, line 13, strike out "Cowesink" and insert "Conswick." In line 14 strike out "the wind was" & insert "with a wind;" and in line 15, after "W," insert "and," and strike out "was;" and after "side," in line 16, insert a comma instead of the period.

Fol. 47, line 6, strike out "work-room" and insert "wash-room;" and in line 25 strike out "from bar and work-room" and insert "for bar and wash-room."

Fol. 48, line 3, strike out "stern" and insert "stem;" and strike out "from" and insert "of;" and line 4 strike out "ahead" and insert
5 "abreast;" line 14, strike out "ahead" and insert "abed."

In line 17, at beginning, insert "I think;" strike out "passing" and insert "sagging."

Fol. 49, lines 18 & 19, strike out "boarded" and insert "housed."

In line 22, after "side," strike out the period and insert a comma; and insert a period after "deck," in line 23.

Fol. 50, line 2, after "deck" insert a semicolon instead of the comma.

Line 9, strike out "ahead" and insert "aboard;" and in lines 15 & 21 strike out "America" and insert "Ansonia."

Fol. 51, line 23, after "stops" insert "I felt the engine stop."

Fol. 54, line 3, strike out "there was;" and in line 4 strike out "anyway" and insert "away."

Line 6, strike out "moved" and insert "measured."

Line 21, strike out "mainmast" and insert "measurement," and
6 after "me" insert "one;" line 24, strike out "Benton" and insert "Burton."

Fol. 55, line 9, strike out "two" and insert "zero;" line 17, strike out "observatory" and insert "observations;" and in line 12, strike out "interrupted" and insert "intensified."

Fol. 58, line 4, strike out "up some" and insert "at same."

EDGAR M. CULLEN,
Proctor for Appt.
R. D. BENEDICT,
Proctor for Appellees.

(Endorsed:) Sup. Court U. S. 1876. October term. No. 138. Peter Lyman, appt., vs. The Steamboat John L. Hasbrouck, &c. R. D. Cornell & al. clmts. Stipulation of counsel correcting record. Filed 2 December, 1876.